

FIRST AMENDMENT TO THE
DRAFT
ENVIRONMENTAL IMPACT REPORT

**BERRYESSA ROAD
GENERAL PLAN AMENDMENT**

City of San Jose

March 2008

PREFACE

This document, together with the DEIR, constitutes the Final Environmental Impact Report (FEIR) for the Berryessa Road General Plan Amendment Project. The DEIR was circulated to affected public agencies and interested parties for a 45-day review period from January 16 to February 29, 2008. This volume consists of comments received by the Lead Agency on the DEIR during the public review period, responses to those comments, and revisions to the text of the DEIR.

In conformance with the CEQA Guidelines, the FEIR provides objective information regarding the environmental consequences of the proposed project. The FEIR also examines mitigation measures and alternatives to the project intended to reduce or eliminate significant environmental impacts. The FEIR is used by the City and other Responsible Agencies in making decisions regarding the project. The CEQA Guidelines require that, while the information in the FEIR does not control the agency's ultimate discretion on the project, the agency must respond to each significant effect identified in the DEIR by making written findings for each of those significant effects. According to the State Public Resources Code (Section 21081), no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

- (a) The public agency makes one or more of the following findings with respect to each significant effect:
 - (1) Changes or alterations have been required in, or incorporated into, the project which will mitigate or avoid the significant effect on the environment.
 - (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
 - (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities of highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.
- (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

In accordance with City policy, the FEIR will be made available to the public for ten days prior to certification of the Environmental Impact Report.

TABLE OF CONTENTS

PREFACE.....	i
I. LIST OF AGENCIES AND ORGANIZATIONS TO WHOM THE DRAFT EIR WAS SENT.....	1
II. LIST OF THE COMMENT LETTERS RECEIVED ON THE DRAFT EIR.....	2
III. REVISIONS TO THE TEXT OF THE DRAFT EIR.....	3
IV. RESPONSES TO COMMENTS RECEIVED ON THE DRAFT EIR AND COPIES OF COMMENT LETTERS.....	6
V. COPIES OF COMMENT LETTERS RECEIVED ON THE DRAFT EIR.....	34

I. LIST OF AGENCIES AND ORGANIZATIONS TO WHOM THE DRAFT EIR WAS SENT

State Agencies

California Department of Fish and Game
California Department of Transportation
California Public Utilities Commission
Metropolitan Transportation Commission
State Clearinghouse

Regional Agencies

Alameda County Planning Department
Association of Bay Area Governments
Bay Area Air Quality Management District
Regional Water Quality Control Board
Santa Clara County Parks and Recreation Department
Santa Clara County Planning Department
Santa Clara Valley Transportation Authority
Santa Clara Valley Water District

Cities

Campbell
Cupertino
Los Gatos
Milpitas
Morgan Hill
Santa Clara
Saratoga
Sunnyvale

School Districts

Berryessa Union School District
East Side Union School District
San José Unified School District

II. LIST OF COMMENTS LETTERS RECEIVED ON THE DRAFT EIR

State Agencies

- | | | |
|----|------------------------------|-------------------|
| A. | Department of Transportation | February 20, 2008 |
| B. | Department of Transportation | February 25, 2008 |

Regional Agencies

- | | | |
|----|--|-------------------|
| C. | Santa Clara County Parks and Recreation Department | February 28, 2008 |
| D. | Santa Clara Valley Transportation Authority | February 29, 2008 |
| E. | Santa Clara Valley Water District | March 3, 2008 |

School Districts

- | | | |
|----|---------------------------------|-------------------|
| F. | Berryessa Union School District | February 28, 2008 |
|----|---------------------------------|-------------------|

Companies

- | | | |
|----|---------------|------------------|
| G. | Kinder Morgan | February 1, 2008 |
|----|---------------|------------------|

III. REVISIONS TO THE TEXT OF THE DRAFT EIR

The following section contains revisions to the text of the *Draft Environmental Impact Report, Berryessa Road General Plan Amendment*, dated January 2008. Revised or new language is underlined. All deletions are shown ~~with a line through the text~~.

Page 29 The following discussion will be **added** after Section 3.7:

3.8 **Bay Area Ridge Trail: El Sombroso/Penitencia (Route R5-C)**

The El Sobroso/Penitencia section of the Bay Area Ridge Trail is a designated trail route within other public lands for hiking, off road cycling, and equestrian. This trail route lies within a small portion of the northern site area and adjacent to the project site to the west and parallels Penitencia Creek. The trail would provide added benefit for alternative transportation access to the Bay Area Rapid Transit (BART) alignment and station proposed adjacent to the subject property.

Consistency: The proposed project assumes a 205-foot setback from the northern and eastern banks of Upper Penitencia Creek to accommodate both the City of San José Riparian Corridor Policy Study required setbacks and the SCVWD's planned flood control improvements. Therefore, future development under the proposed General Plan amendment would not interfere with the El Sobroso/Penitencia section of the Bay Area Ridge Trail as the trail would be located within the planned future SCVWD right-of-way.

Page 55 Section 4.4.1.1, last paragraph on the page will be **revised** as follows:

The USACE is continuing to evaluate alternatives that would provide cost-effective flood protection in an environmentally sensitive nature. The USACE is currently preparing a feasibility study and environmental impact report/environmental impact statement, which are scheduled for completion by ~~December 2007 and June 2008, respectively~~ September 2009. Over the past year, San José and SCVWD staff has been meeting with local, state and federal agencies, as well as other interested stakeholders, to develop recommendations for future actions in the Upper Penitencia project area.

Page 56 First paragraph on the page will be **revised** as follows:

The currently preferred alternative is a widened Penitencia Creek channel and floodplain with floodwalls to control the peak flow of a 100-year flood event. The preferred alternative would require a 205-foot wide corridor, measured from the northern and eastern banks of ~~Berryessa Creek~~ Upper Penitencia Creek (on the north and east sides of the project site).

Page 76 The following mitigation measure will be **added** to the end of Section 4.5.3.2:

Future landscaping and project design will be evaluated for consistency with the recommendations developed by the Water Resources Protection Collaborative in the “Guidelines and Standards for Land Use Near Streams”.

Page 104 The following text will be **added** to the end of Section 4.8.4.2:

The proposed project offers opportunities to expand non-motorized transportation and circulation routes given the location of identified trail routes and the park chain immediately adjacent to the proposed project site. The trail alignment offers opportunities for non-motorized transportation connections with the surrounding neighborhoods, proposed BART station, schools, parks, and other open space areas.

Page 150 Section 5.3, the third complete paragraph on the page will be **revised** as follows:

State law (Government Code Section 65996) specifies an acceptable method of offsetting a project’s effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit. California Government Code Sections 65995-65998, sets forth provisions for the payment of school impact fees by new development as the exclusive means of “considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property.” [Section 65996(a)]. The legislation goes on to say that the payment of school impact fees “are hereby deemed to provide full and complete school facilities mitigation” under CEQA. [Section 65996(b)]. The school district is responsible for implementing the specific methods for mitigating school impacts under the Government Code. The school impact fees and the school districts’ methods of implementing measures specified by Government Code 65996 would ~~partially offset~~ mitigate project-related increases in student enrollment.

Page 150 Section 5.3, the fourth complete paragraph on the page will be **revised** as follows:

The Berryessa Union School District has reached an agreement with the San José Flea Market for the dedication of a 3.5-acre school site to construct a school on that site to accommodate future students associated with the Flea Market site and other sites in the vicinity anticipated to generate students, possibly including the project site. A new elementary school on the Flea Market site would contribute incrementally to the impacts of development identified for the project as a whole, but is not expected by itself to have new or substantially different significant adverse environmental impacts. ~~The~~ A future school on the Flea Market site will be subject to environmental review by the school district as the Lead Agency. Further discussion at this time of the impacts that might result from building of a school on the Flea Market or elsewhere in the project area would be speculative.

IV. RESPONSES TO COMMENTS RECEIVED ON THE DRAFT EIR

The following section includes all the comments on the DEIR that were received by the City in letters, emails, and phone calls during the advertised 45-day review period. The comments are organized under headings containing the source of the comment and the date submitted. The specific comments have been excerpted from the letters and are presented as “Comment” with the response directly following. Each of the letters submitted to the City of San José is also contained in its entirety in Section V of this document.

CEQA Guidelines Section 15086 requires that a local lead agency consult with and request comments on the Draft EIR prepared for a project of this type from responsible agencies (government agencies that must approve or permit some aspect of the project), trustee agencies for resources affected by the project, adjacent cities and counties, and transportation planning agencies. Section I of this document lists all of the recipients of the DEIR.

The four comment letters below are from public agencies. The CEQA Guidelines require that:

A responsible agency or other public agency shall only make substantive comments regarding those activities involved in the project that are within an area of expertise of the agency or which are required to be carried out or approved by the responsible agency. Those comments shall be supported by specific documentation. [§15086(c)]

Regarding mitigation measures identified by commenting public agencies, the CEQA Guidelines state that:

Prior to the close of the public review period, a responsible agency or trustee agency which has identified what the agency considers to be significant environmental effects shall advise the lead agency of those effects. As to those effects relevant to its decisions, if any, on the project, the responsible or trustee agency shall either submit to the lead agency complete and detailed performance objectives for mitigation measures addressing those effects or refer the lead agency to appropriate, readily available guidelines or reference documents concerning mitigation measures. If the responsible or trustee agency is not aware of mitigation measures that address identified effects, the responsible or trustee agency shall so state. [§15086(d)]

None of the comment letters received from public agencies includes any performance objectives for mitigation measures.

A. RESPONSE TO COMMENTS FROM STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION, FEBRUARY 20, 2008

Comment A1: Table 6, Page 100, shows that the project will contribute additional trips on segments of US 101 that are already below LOS D. In order to encourage use of the future BART line as an alternative to driving and thereby lessen these additional project-related traffic impacts on US 101, we suggest that the pedestrian and bicycling connection between the existing housing development on the north side of Berryessa Road (east of the railroad track) and the future BART station be improved. In order to do this, consider providing a pedestrian and bicycle connection from the ends of Fern Pine Court and Heavenly Bamboo Court to the edge of the railroad right-of-way, along which right-of-way could potentially be preserved for a pedestrian and bicycle path leading to Berryessa Road with an improved, safe crossing to the future BART station site.

Response A1: This project is on the south side of Berryessa Road and does not control right-of-way on the north side, nor is it clear how the suggested improvement would reduce project impacts since future project residents on the south side of Berryessa Road would not use a connection on the north side of Berryessa Road to access the future BART station. The City of San José will continue to implement all possible pedestrian improvements in the station vicinity, consistent with adopted General Plan policies.

Comment A2: In addition, we note that the analysis of cumulative impacts shows significant unmitigated impacts on state highway facilities. The approved San José Flea Market project is in the vicinity of the future BART station at Berryessa Road and is one of the projects included in the cumulative impact analysis. In order to encourage use of the future BART line as an alternative to driving and thereby lessen cumulative impacts on state highways in the GPA area, consider providing a sidewalk along the north side of Berryessa Road between the San José Flea Market and the future BART station, if not already planned. Ideally, this would be of adequate width and buffering from traffic in order to facilitate access to the future BART station.

Response A2: This project is on the south side of Berryessa Road and does not control right-of-way on the north side. The City of San José will continue to implement all possible pedestrian improvements in the station vicinity, consistent with adopted General Plan policies, and will consider the suggested improvement in the context of development permits related to the Flea Market project.

Comment A3: We understand the report adopts the City of San José's traffic forecasting model. The Department would like to see the number of generated trips resulting from the Berryessa Road (Rd.) General Plan Amendment (GPA) using this model. If the project-generated trips are more than 100 vehicles per hour (vph), a traffic impact study (TIS) is required as noted in our letter dated April 27th, 2007.

Response A3: As discussed on page 6 of the DEIR, the level of development analyzed for the proposed General Plan amendment is based on the City's standard methodology. No specific development is proposed at this time and no specific time frame for development is known. As a result, the traffic analysis is representative of possible not actual development. If the proposed General Plan amendment is approved and a specific development project is proposed under the new land use designation, a full

Transportation Impact Analysis will be prepared as part of a subsequent CEQA process for the specific project. It is not the City of San José's policy to prepare near term TIA's for General Plan amendments with no specific development proposals.

Comment A4: The Berryessa Rd. GPA, bounded by N. King Rd and Berryessa Rd., with a maximum land use available of 9.87 acres available requires a complete TIS. LOS E/F link under link set 3-East of US 101 in Tables 5 and 6 indicates a volume increase of 191 and 151 vehicles per hour (vph) and the V/C change is over 0.01 during AM and PM peak hours. The GPA would have a significant traffic impacts on the interchanges of Berryessa and US 102 and I 680. Therefore, we would expect a TIS, inclusive of turning movement traffic and LOS for these interchanges. The TIS should also include the LOS of basic freeway segments for US 101 between Mabury Rd. and Oakland Rd. and I 680 between Mabury Rd. and Hostetter Rd.

Response A4: Please refer to Response A3.

Comment A5: The TIS in the DEIR is for the housing conversion site only. The Department requests an additional TIS for the second proposed GPA, the offsetting employment capacity site, located on approximately 13.68 acres at the corner of Junction Avenue and Dado Street in the City of San José.

Response A5: As stated on page 102 of the DEIR, the existing land use designation on the Offsetting Employment Capacity Site would allow up to 726 jobs on the site. The proposed *Heavy Industrial* designation would only allow 246 jobs, a net loss of 480 jobs. A net loss of jobs would result in a net reduction in daily traffic trips if the site were to be redeveloped. The project, as proposed, would not redevelop the Offsetting Employment Capacity Site and it is assumed that the existing land use will remain on-site as it is compatible with the proposed General Plan designation. For these reasons, the City concluded that a traffic assessment was not required for this portion of the project.

Comment A6: The Department notes the winter 2007 cumulative analysis presented in this report. However, the winter 2007 analysis is actually the current year traffic study, and as such, cannot substitute for the 2025 cumulative traffic impact study. Consequently, the report omits the 2025 cumulative traffic impact study and is incomplete. The cumulative and cumulative plus project traffic impact studies are required. Please include in the TIS the Project Only Conditions, Cumulative Conditions, and Cumulative plus Project Conditions.

Response A6: There is some confusion about the terminology. The Winter 2007 cumulative analysis includes all the proposed General Plan amendments that are on file for the Winter 2007-2008 review. All general plan traffic analyses are evaluating the City's General Plan Horizon Year which is presently 2020.

Comment A7: Project Scenario Analysis, page 97: On state routes that are at Level of Service (LOS) F any additional trips would be a significant impact and would need to be mitigated. A roadway at LOS F would be operating at congested conditions and any additional trips would add to the existing delay and queuing on the roadway, causing a significant impact.

Response A7: As discussed on pages 97 to 101 of the DEIR, the proposed project could significantly impact all the roadways identified in Link Set 3 and concludes that the

impacts will be significant and unavoidable because all planned transportation improvements were assumed to be in place for purposes of this analysis and no new mitigation was identified for the future condition in the General Plan Horizon Year.

Comment A8: Table 5 and 6, Pages 99-100. The capacities used in this table are incorrect. For High Occupancy Vehicle (HOV) lanes the capacity is 1650 vph, for mixed-flow or general-purpose lanes the capacity is approximately 200 vehicles per hour per lane (vphpl). The capacity of an auxiliary lane is the lesser of the on-ramp or off-ramp. This table needs to be updated based on these capacities and the impacts need to be re-evaluated.

Response A8: The capacities used in Tables 5 and 6 were based on the CUBE Model run outputs and while higher than the capacities stated above, they are consistent with the capacities in the City's model which is based on the regional VTA model.

Comment A9: Table 5 and 6, Pages 99-100, How would volumes on the freeways decrease with this project? This does not seem feasible when a development is being proposed.

Response A9: As stated previously and consistent with all City of San José General Plan amendment processes since the mid-1970's and with good planning practices, a general plan traffic analysis looks at anticipated conditions in the General Plan 2020 model year. This condition includes freeway improvements not presently in existence.

Comment A10: Transportation Impacts from the Offsetting Employment Capacity Site, page 102. The report states: *The current land use designation would allow approximately 726 jobs on the site. The proposed Heavy Industrial designation would allow approximately 246 jobs on site. The net loss of jobs on the site would result in fewer daily trips.* Is there a current development on the site with approximately 726 jobs or is this site vacant? If it is vacant then you cannot say that there would be a net loss of jobs and a traffic impact study must be done. In addition, existing and background traffic volumes will have changed since the initial land use designation and therefore the current proposal of the Offsetting Employment Capacity site needs to be analyzed with these latest traffic volumes to determine if this development will cause any significant impacts.

Response A10: The Offsetting Employment Capacity Site is currently occupied. Please refer to Response A5.

Comment A11: Page 104, Conclusion, As this development is causing a significant impact to the roadway links, the impacts to the state routes must be mitigated or fair share fees must be collected for mitigation implementation.

Response A11: The proposed project is a General Plan amendment only. Because no specific development is proposed at this time, no fair share contribution can be established because the actual level of development that would occur under the proposed General Plan designation is unknown. Project specific mitigation for these impacted roadways would be proposed at the time a specific future development was proposed and analyzed, consistent with CEQA and state law.

Comment A12: Analysis of Cumulative Impacts, Section 6.3: Significant impacts to state routes under cumulative conditions must be mitigated or fair share fees must be collected for mitigation implementation.

Response A12: Please see Response A11.

Comment A13: Appendix D, Figures 2a and 2b, Explain how the volumes on the freeway would decrease under the project conditions when all of the roads leading to the freeway would have increased volumes. There is a need to analyze more than one freeway segment on both US 101 and I 680.

Response A13: The screenline analysis as shown in Tables 5 and 6 presents the volume in the peak direction. The changes in land use, from Light Industrial to Transit Corridor Residential, could potentially affect peak direction traffic flow. The assignment of the volumes is also dependent on multiple variables including congestion, available link capacity, and link speed. These factors could contribute to a decrease in volumes on certain links as travel patterns change. The project volumes used in Figures 2a and 2b were based on the CUBE Model run outputs.

B. RESPONSE TO COMMENTS FROM STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION, FEBRUARY 25, 2008

Comment B1: Thank you for continuing to include the California Department of Transportation (Department) in the environmental review process for the proposed project. On February 20, 2008, we sent you our comment letter on the DEIR. This letter is a follow-up to provide you with a **correction (in bold)** on our Highway Operations comment #2 as follows:

Highway Operations

2. Table 5 and 6, Pages 99-100. The capacities used in this table are incorrect. For High Occupancy Vehicle (HOV) lanes the capacity is 1650 vph, for mixed-flow or general-purpose lanes the capacity is approximately **2000** vehicles per hour per lane (vphpl). The capacity of an auxiliary lane is the lesser of the on-ramp or off-ramp. This table needs to be updated based on these capacities and the impacts need to be re-evaluated.

Response B2: The capacities used in Tables 5 and 6 were based on the CUBE Model run outputs and while higher than the capacities stated above, they are consistent with the capacities in the City's model which is based on the regional VTA model.

**C. RESPONSE TO COMMENTS FROM COUNTY OF SANTA CLARA PARKS
AND RECREATION DEPARTMENT, FEBRUARY 28, 2008**

Comment C1: The DEIR should discuss consistency with, or impacts as a result of, any changes in Land Use Designation with the Joint Use Agreement for the Penitencia Creek Park Chain, a portion of which is adjacent to the project site on the north and east sides on parcels adjacent to parcels owned by the Santa Clara Valley Water District. A Tri-party agreement for the development of the Penitencia Creek Park Chain for recreation and flood control infrastructure is in effect between Santa Clara County, the City of San José, and the Santa Clara Valley Water District (SCVWD). This agreement was approved by the County Board of Supervisors, the San José City Council and the SCVWD Board of Directors to ensure that the Penitencia Creek Trail, from Coyote Creek to Alum Rock Park, shall be developed, operated, and maintained through the cooperation of the three entities and that future development would interface appropriately with the Park Chain.

Response C1: As discussed in the DEIR in the Project Description and in Section 4.4.2.2, the proposed project assumes a 205-foot setback from the northern and eastern banks of Upper Penitencia Creek to accommodate both the City of San José Riparian Corridor Policy Study required setbacks and the SCVWD's planned flood control improvements. Therefore, future development under the proposed General Plan amendment would not preclude the SCVWD from implementing their flood control project. Creek trails are commonly located on SCVWD property, typically along maintenance roads. Because future development would not interfere with the flood control project, any trails planned adjacent to the project site in conjunction with the Penitencia Creek Park Chain would not be impacted. The portion of the subject site included within the assumed 205-foot setback would be subject to the terms of the Joint Use Agreement if/when it is acquired by the District, City, or the County.

Comment C2: The DEIR should discuss consistency with the policies of the *Penitencia Creek Master Plan*, approved by the County Board of Supervisors in 1977. The *Penitencia Creek Master Plan* was an outgrowth of the Joint Use Agreement for the Penitencia Creek Park Chain and serves as a guide for future improvements along Penitencia Creek. The project site is within the planning area of the *Penitencia Creek Park Master Plan*.

Response C2: The project site is fully developed at this time. CEQA requires that impacts of the proposed project be compared to existing conditions. Future development that includes the setbacks identified in Response C1 above will have less impact on the creek and park chain, and will be more compatible with the Joint Agreement, than existing conditions. In addition, future development under the proposed General Plan amendment would not preclude implementation of the Penitencia Creek Park Master Plan.

Comment C3: While the DEIR has identified consistency with the City's Trails and Pathways Policy No. 1, the DEIR should acknowledge that the County's General Plan policies regarding countywide trails and the guidelines of the *Santa Clara Countywide Trails Master Plan Update (Countywide Trails Master Plan)*, approved by the County Board of Supervisors as part of the Parks and Recreation Element of the County of Santa Clara General Plan (1995-2010). The DEIR should describe the following countywide trail route within and adjacent to the project site:

- ***Bay Area Ridge Trail: El Sombroso/Penitencia***, (Route R5-C) – Designated as trail route within other public lands for hiking, off road cycling, and equestrian. This trail route lies within a small portion of the northern site area and adjacent to the project site to the west and parallels Penitencia Creek. The trail would provide added benefit for alternative transportation access the Bay Area Rapid Transit alignment and station proposed adjacent to the subject property.

Response C3: The text of the DEIR will be revised to reflect the information provided. Please see Page 3 of this document for the proposed text revisions.

Comment C4: In light of the proposed General Plan Land Use designation change, the Transportation and Circulation section of the DEIR should address the opportunities to expand non-motorized transportation and circulation routes given the location of the previously noted the trail routes and park chain immediately adjacent to the proposed project site. The trail alignment offers opportunities for non-motorized transportation connections with the surrounding neighborhoods, proposed BART station, schools, parks and open space areas.

Response C4: The text of the DEIR will be revised to reflect the information provided. Please see Page 4 of this document for the proposed text revisions.

**D. RESPONSE TO COMMENTS FROM SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY, FEBRUARY 29, 2008**

Comment D1: The proposed General Plan amendment does not sufficiently support future Transit Oriented Development (TOD) potential for the future BART Berryessa Station area. The Draft Silicon Valley Rapid Transit (SVRT) Station Areas Vision Plan document identifies this site for mixed-use development, and auxiliary station facilities including a bus transit center, shuttle bay, and kiss-and-ride area.

Response D1: As discussed on page 9 of the DEIR, the proposed General Plan amendment to *Transit Corridor Residential* (20+ DU/AC) would allow a mix of residential and commercial land uses to be developed on the project site consistent with the City of San José BART Station Area Nodes Strategy. Future residential and/or commercial development under the proposed General Plan amendment would not preclude auxiliary station facilities for BART from also occupying the site.

Comment D2: Additionally, the City of San José has requested consideration of developing the future BART stations as mixed-use transit villages that have both jobs and households. The approved San José Flea Market Mixed Use Transit Village located west of the future BART Berryessa Station proposed mixed-uses and residential densities of approximately 55 du/ac. VTA recommends similar development patterns east of the future BART station.

The San José General Plan defines areas within a 3,000-foot radius from a planned BART station as with a “BART Station Area Node.” The General Plan defines a “Berryessa Station Area Node” in which development of the BART station is encouraged to be coordinated with development of adjacent and surrounding properties. The Berryessa Station Area Node policy plans for a mix of job generating land uses, high-density residential, supportive commercial uses, and park/open spaces in the location of this General Plan amendment. The “San José Flea Market Mixed Use Transit Village” was planned in accordance with these General Plan policies, and this site should follow the applicable General Plan Station Area Node land use policies that support similar TOD development.

As stated in the comments made by VTA for the Berryessa Road GPA Notice of Preparation, a minimum project net density (i.e. excluding land for parks and roads) of 55 du/ac is required for this site. VTA supports higher development densities in order to support the planned future transit investment.

Response D2: As stated in the project description on page 6 of the DEIR, the proposed land use designation is *Transit Corridor Residential* (20+ DU/AC). General Plan policy provides that Urban Transit Corridor Residential is intended for sites located in the Downtown Core and Frame Areas or within a reasonable walking distance of passenger rail stations (a reasonable walking distance is defined as approximately 2,000 feet along a safe pedestrian route) in other intensely developed areas of the City, such as the subject location. Development should be wholly residential or allow commercial uses on the first two floors with residential uses on remaining floors and should generally exceed 45 DU/AC. The standard San José methodology used to estimate the impacts of a future development under the proposed land use designation was 55 DU/AC. Furthermore, the project applicant’s goal for this project (page 2 of the DEIR) is to construct transit

oriented residential development designed to support BART ridership. Therefore, it is anticipated that any future residential development on the project site would be constructed at a density of at least 45 DU/AC and likely above 55 DU/AC.

Comment D3: As stated in the comments made by VTA for the Berryessa Road GPA Notice of Preparation (May 2, 2007), VTA is planning to construct the Berryessa Station, Berryessa Station Transit Center, and various BART auxiliary facilities in support of the BART Extension in the area proposed for this General Plan amendment. Attached are conceptual plans from the previously approved BART Extension Final and Supplemental EIR that show the BART improvements for this area. These proposed BART facilities would conflict with development on portions of this site.

Response D3: The City of San José is aware of the VTA's evaluation of the project site for the proposed Berryessa BART Station and auxiliary facilities. At this time, however, the VTA does not own or control the subject property. The proposed BART project does not preclude the current property owner from pursuing an alternative land use designation or development proposal for this site.

Comment D4: As part of the long-range analysis, VTA recommends including segments of US 101 between Old Oakland Road and I-680/I-280.

Response D4: The CUBE model looks at the roadway network throughout the entire City, including the suggested segments, but the report just identifies locations with significant impacts.

Comment D5: VTA's Congestion Management Program (CMP) requires a Transportation Impact Analysis (TIA) for any specific project that is expected to generate 100 or more new peak-hour trips. Based on the information provided on the size of these projects, TIAs may be required. VTAs *Transportation Impact Analysis Guidelines* should be used when preparing TIAs. This document includes the analysis of bicycle facilities, parking, site circulation and pedestrian access, as well as roadways, and may be downloaded from www.vta.org/news/vtacmp/TechnicalGuidelines.

Response D5: As discussed on page 6 of the DEIR, the development assumptions analyzed for the proposed General Plan amendment are based on the City's standard methodology. No specific development is proposed at this time and no specific time frame for development is known. As a result, the traffic analysis is representative of possible not actual development. If the proposed General Plan amendment is approved and a specific development project is proposed under the new land use designation, a full near-term intersection level of service Transportation Impact Analysis will be prepared as part of the CEQA process for that specific project. It is not the City of San José's policy to prepare near term TIA's for General Plan amendments with no specific development proposals. The City employs the CUBE model to assess the far-term impacts of General Plan amendments.

E. RESPONSE TO COMMENTS FROM SANTA CLARA VALLEY WATER DISTRICT, MARCH 3, 2008.

Comment E1: File No. GP07-04-04: This project location is not adjacent to any District facilities; therefore, a District permit is not required.

Response E1: It is acknowledged that the Offsetting Employment Capacity Site is not adjacent to any District facility and no action under the proposed project requires a permit.

Comment E2: File No. GP06-04-05: This project location is bounded by the District's Upper Penitencia Creek to the north and east and the District's Central Pipeline, a 66-inch diameter raw water line, to the west. In accordance with District Ordinance 06-1, any plans for construction over the District's fee or easement land rights should be sent to us for review and issuance of a permit.

Response E2: It is acknowledged that the proposed General Plan amendment site (Housing Conversion Site) is bounded on the east and north sides by Penitencia Creek and on the west side by the District's Central Pipeline. Any future development plans submitted to the City of San José under the proposed General Plan amendment will also be submitted to the District for review and issuance of permits in accordance with District Ordinance 06-1.

Comment E3: Page 55, last paragraph, mentions the U.S. Army Corps of Engineers' (Corps) "feasibility study and Environmental Impact Report/Environmental Impact Statement(EIR/EIS), which are scheduled for completion by December 2007 and June 2008, respectively." These dates are no longer current and this statement needs to be revised, since the Corps is working to have draft reports by September 2009.

Response E3: The text of the DEIR will be revised to reflect the information provided. Please see Page 3 of this document for the proposed text revisions.

Comment E4: Page 56, first paragraph, states that "the currently preferred alternative is a widened Penitencia Creek channel and floodplain with floodwalls". Please note that this alternative is currently the District's recommended alternative.

Response E3: It is acknowledged that the widening of the Penitencia Creek channel and floodplain with floodwalls is the District's recommended alternative.

Comment E5: Page 56, first paragraph, also mentions Berryessa Creek. This creek name should be revised to Upper Penitencia Creek.

Response E5: The text of the DEIR will be revised to reflect the information provided. Please see Page 3 of this document for the proposed text revisions.

Comment E6: It is the District's understanding that the City of San José (City) is aware that the Valley Transportation Authority (VTA) is evaluating the area for a park and ride lot to service the future Berryessa Silicon Valley Rapid Transit (SVRT) Station. The District has been in discussions with the VTA on their proposed station and the needs of the future flood project.

Response E6: The City of San José is aware of the VTA's evaluation of the project site for the proposed Berryessa BART Station. At this time, however, the VTA does not own or control the subject property. The proposed BART project does not preclude the current property owner from pursuing an alternative land use designation for this site.

As discussed in the DEIR in the Project Description and in Section 4.4.2.2, the proposed project assumes a 205-foot setback from the northern and eastern banks of Upper Penitencia Creek to accommodate both the City of San José Riparian Corridor Policy Study required setbacks and the SCVWD's planned flood control improvements. Future development under the proposed General Plan amendment would not preclude the SCVWD from implementing their flood control project.

Comment E7: Appendix G, February 14, 2007 Letter for Water Supply Assessment (WSA): It appears in this letter from San José Water Company (JWC) signed by Mr. Bill Tuttle to Mr. Michael Sheehy that the projected water demand (305 Acre-feet/year at build-out) from the proposed development is included in the SJWC's 2005 Urban Water Management Plan. Please submit the finalized version of the WSA for our review. Our expectation is that aggressive water conservation and recycled waster use will be pursued as part of this proposed development.

Response E7: Water Supply Assessments prepared by the San José Water Company must be approved by their Board prior to submittal to the City. The WSA in Appendix G of the DEIR is the finalized version.

Comment E8: The District is the principal wholesaler of treated water in Santa Clara county and manages the groundwater sub-basins. In the future, we request that WSA drafts be routed to us for review before the Draft EIR to ensure compliance with water code Section 10910 (SB610). Generally, we ask to review any proposed development with a minimum of 500 proposed dwelling and/or 200 acre-feet/year at build-out.

Response E8: It is acknowledged that the SCVWD would like to review WSAs prior to issuance of DEIRs. The City will include the SCVWD in the preparation of future WSAs prepared by City-owned Muni Water. However, the subject site within the service area of the private San José Water Company, who is solely responsible for preparation of its WSA, which was included in the Draft EIR for the District's review.

Comment E9: Page 64, bottom of page, states "Seven special status plant species are known to occur in the vicinity of the project site". Please provide a table listing these species along with their habitat requirements and potential occurrence in the study area, with rationale as to why these taxa are unlikely to be present (similar to Table 2). Alternatively, please list species in text and reference Table 1 in Appendix B. This information should be present in the text of the DEIR to fully document rationale for lack of significant impact.

Response E9: As discussed on page 64 of the DEIR, the seven special status plant species known to occur in the project area are not on-site because the site does not support suitable habitat for any of these species. Therefore, no more detailed description of these species was provided within the main text of the DEIR. The plant species are, however, listed on page 8 of Appendix A for reference.

Comment E10: Appendix B, page 1, paragraph 1: The District usually finds *Juglans californica* var. *hindsii*, northern California black walnut, not *J. californica* var. *californica* (southern Ca black walnut). Please revise text, as appropriate.

Response E10: While the District may usually find *Juglans californica* var. *hindsii*, northern California black walnut, not *J. californica* var. *californica* (southern Ca black walnut) within local riparian areas, the biological assessment was based on field work completed on the project site by a qualified biologist.

Comment E11: Appendix B, page 4, last paragraph: Black walnut is not native to our area.

Response E11: According to Calflora, *J. californica* is the rare native species from southern California and *J. hindsii* is the rare native species from northern California. Therefore, black walnuts are considered native to California.

Comment E12: Appendix B, page 6, second paragraph; and page 8, Table 1: Does Table 1 provide a comprehensive list of special status plant species? Only Threatened & Endangered species are listed. What about California Native Plant Society (CNPS) List species?

Response E12: At the top of Table 1, just above the species list, it states that the plant species list was completed using data from CDFG and CNPS. In addition, plant species identified from the CNPS are designated in the “status” column of the table.

Comment E13: Page 8, Table 1: Occurrence in the study area cannot be definitively listed as “Absent” since comprehensive botanical surveys of the study area were not conducted during appropriate bloom period—and it is not clear if any botanical surveys were conducted at all. Table should be revised to read “Likelihood of Occurrence Presumed Low”.

Response E13: The determination of presence or absence of a plant species in the study area was based on site surveys conducted by a qualified biologist as stated on Appendix B of the DEIR. As is discussed in the table, the plants were not presumed absent due to a lack of individual species in the project area, but rather a lack of suitable habitat (i.e., the site is fully developed with buildings, pavement, and ornamental landscaping) which can be discerned regardless of the bloom period of the plant in question.

Comment E14: Appendix B, page 19, Section 3.3.1: It does not appear that any botanical surveys of the project sites were performed. Therefore, it appears that there is an assumption that none of the species occur in the project areas. Please add rationale about low likelihood due to lack of suitable habitat.

Response E14: Please refer to Response E13.

Comment E15: Appendix B, page 21, Section 3.3.4, states “And, with the possible exception of the western pond turtle, the site does not represent a significant movement corridor for native wildlife.” This statement is incomplete. This section of stream along Upper Penitencia Creek is also an extremely valuable migratory corridor for Federally Threatened Steelhead. Minimization of impacts to in-stream habitat should be discussed here and possible mitigation measures should also be discussed.

Response E15: The discussion under section 3.3.4 is limited to wildlife species that travel through the riparian corridor and does not include fish species. As seen in Table 1 of Appendix A, Steelhead are acknowledged as being present in Upper Penitencia Creek. A discussion of project impacts within the creek channel is presented on page 25 of Appendix B and on pages 72-73 of the DEIR, which acknowledges the passage of steelhead along Upper Penitencia Creek.

Comment E16: Page 63, fourth paragraph: Black walnut is described as being a native tree, but is not considered so by the CNPS. Most are escapes from orchards.

Response E16: Please refer to Response E11.

Comment E17: Page 71, second paragraph; and page 75, ninth paragraph: Add reference that the project should be consistent with the recommendations developed by the Water Resources Protection Collaborative in the “Guidelines and Standards for Land Use Near Streams”.

Response E17: Consideration of consistency with the aforementioned reference will be identified as a Mitigation Measure to be Considered at the Time of Future Development. Please see page 4 of this document for the proposed text amendment.

Comment E18: Page 75, Section 4.5.3.1, Mitigation and Avoidance Measures, General Plan Policies: The general plan policies bulleted here appear to overlook an important potential ecological impact – the detrimental impact of the tree species chosen for landscaping and tree replacement on the projects. The sustainability of the riparian forest on Upper Penitencia Creek can be strongly impacted by the neighboring landscape trees through:

- a) pollen exchange and hybridization between non-local ecotypes or ornamental cultivars used in landscaping and the native riparian trees
 - e.g. Lombardy poplar in the project landscape can pollinate native Fremont cottonwoods on the creek and the offspring will naturalize the creek, degrading the natural riparian habitat
- b) invasive fruits and seeds vectored to the creek by wind, birds, animals
 - e.g. fruiting “ornamental” plums, fruiting “ornamental” olives, holly oak, Italian buckthorn, pyracantha, etc

Design Guides 1 through 5 of Chapter 4 of the aforementioned “Guidelines and Standards for Land Use Near Streams” provide an overview for selection of landscape species compatible with native habitat. District staff would also be pleased to provide more specific information. The project environmental planner and/or landscape architect is welcome to call Linda Spahr, District revegetation biologist, at (408) 265-2607, extension 2752. Because the future capital project with riparian mitigation will be constructed immediately adjacent the proposed Berryessa Road projects, the District seeks the City’s cooperation in ensuring the success in the natural ecology of the neighborhood.

Response E18: The City policies listed (page 75 and 76 of the DEIR) state that replacement trees should be selected based on their appropriateness for the project site and also that the development must be consistent with the provisions of the San José Riparian Corridor Policy Study. In addition, the mitigation measures to be implemented at the time of future development (page 77 of the DEIR) specifically state that the species

of trees planted will be determined by the City Arborist. Therefore, City policies and proposed mitigation included in the DEIR will ensure that replacement trees will not impact the sustainability of the riparian forest along Upper Penitencia Creek.

Comment E19: There should be no overbank drainage from the developed portions of the site into the creek. For developed portions of the site, storm water runoff should be collected and distributed to the city's storm drain system. If an outfall into the creek is needed, the outfall design should be consistent with those found in the aforementioned "Guidelines and Standards for Land Use Near Streams".

Response E19: As stated on page 56 of the DEIR, there is currently no overland release of stormwater into the creek from the project site. Stormwater enters the creek through a series of drainage pipes. If the project site were to be redeveloped under the proposed General Plan amendment, the site would continue to utilize an underground drainage system and future drainage would be required to conform to City policy 6-29 (Post-Construction Urban Runoff Management) and 8-14 (Hydromodification Management) as they apply at the time of project submittal to the City.

Comment E20: A Hydromodification Management Plan (HMP) should be implemented in compliance with the Santa Clara Valley Urban Runoff Pollution Prevention Program's (SCVURPPP) National Pollutant Discharge Elimination System (NPDES) permit, including the October 2001 RWQCB Order 01-119 amending the Program's C.3 permit provisions regarding new development and redevelopment requirements. In particular, per C.3 provisions the project should be required to treat its stormwater and shall not increase stormwater runoff rates or durations when such increases will result in an increased potential for erosion or other adverse impacts to beneficial uses.

Post-construction water quality mitigation needs to be implemented. The design of the project area should incorporate water quality mitigation measures such as those found in the "Start at the Source-Design Guidance Manual for Stormwater Quality Protection," prepared for the Bay Area Stormwater Management Agencies Association.

For sites greater than one acre, the developer must file a Notice of Intent to comply with the State's NPDES General Permit for Storm Water Discharges Associated with Construction Activity with the State Water Resources Control Board. The developer must also prepare, implement, and maintain a Storm Water Pollution Prevention Plan (SWPPP) and provide measures to minimize or eliminate pollutant discharges from construction activities.

To prevent pollutants from construction activity, including sediments, from reaching Upper Penitencia Creek, please follow the Santa Clara Urban Runoff Pollution Prevention Program's recommended Best Management Practices for construction activities, as contained in "Blueprint for a Clean Bay," and the "California Storm Water Best Management Practice Handbook for Construction."

Response E20: As discussed on page 57 of the DEIR, the project site is located within a watershed that requires a Hydromodification Management Plan for projects greater than 50 acres in size. The proposed project site is only 13.64 acres and, therefore, does not currently require an HMP. Nevertheless, the DEIR also states that any future

development on the project site will be required to comply with the applicable regulations of the City's HMP policy (Policy 8-14) that is in effect at the time the development is proposed.

Pages 56-62 of the DEIR discuss the proposed General Plan amendment's compliance with current NPDES requirements and mitigation measures that will be required of any future development.

Comment E21: The proposed development within the existing floodplain should not increase the 100-year water surface elevation on surrounding properties nor should it increase existing flooding. The site grading must be designed to allow for the passage and storage of flood water within the site. A flood plain analysis will need to be prepared to delineate the post development floodplain depth and lateral extent.

Response E21: As stated on page 58 of the DEIR, any future development under the proposed General Plan amendment will be required to comply with the City's Flood Hazard Ordinance. This requirement, along with conformance of FEMA requirements, is also listed as mitigation to be considered at the time of future development on page 60 of the DEIR. At the time a specific development is proposed the City could require a flood plain analysis to ensure that flood hazards will not be increased by new development on the project site.

Comment E22: District records show two wells on the site. In accordance with the District Ordinance 90-1, the owner should show any existing well(s) on the plans. If a well is located on the site during construction activities, it must be protected or properly destroyed in accordance with the District's standards. Property owners or their representatives should call the Wells and Water Production Unit at (408) 265-2607, extension 2660, for more information regarding well permits and registration or destruction of any wells.

Response E22: At the time of future development the applicant will be required to identify and, if necessary, destroy any well in accordance with District standards and City requirements.

Comment E23: Please submit two sets of improvement plans when available for our review and issuance of a permit. The submittal should include grading and drainage, fencing, landscaping and irrigation plans.

Please reference File No. 1706 on further correspondence regarding the project.

Response E23: There is no specific development proposed at this time. If a future development project is proposed, the SCVWD will be included in the review process.

F. RESPONSE TO COMMENTS FROM BERRYESSA UNION SCHOOL DISTRICT, FEBRUARY 28, 2008

Comment F1: This letter provides comments on behalf of Berryessa Union School District (“School District” or “District”) on the Draft Environmental Impact Report dated January 2008 (“DEIR”), prepared for the Berryessa Road General Plan Amendment, file numbers GP06-04-05 and GP07-04-04 (“Project”).

The Project proposes amendments to the City of San José General Plan and rezoning that would, among other things, allow for the future development of up to 2,818 residential units at the Project site. In a letter dated Ma 1, 2007, in response to the Notice of Preparation (“NOP”) for the DEIR, the School District stated that is such an increase in residential units within the School District occurs, the School District will need to construct a new school to accommodate the students generated by that development. The DEIR fails to adequately consider these issues.

Response F1: It appears that this comment is in reference to another project (San José Flea Market Mixed Use Development, to the west of the subject site) as the proposed project does not assume 2,818 residential dwelling units. It should also be noted that the project involves a General Plan amendment, but currently does not include a rezoning.

Comment F2: According to the DEIR, the Project is twofold. First, the Project makes a general plan amendment to change the land use/transportation diagram destination from Light Industrial to Transit Corridor Residential on a 13.64-acre site approximately 770 feet southwest from the intersection of Berryessa Road and North King Road (1610 – 1650 Berryessa Road) (“Housing Conversion Site”). The DEIR analyzes a development of approximately 543 residential units and 102,648 square feet of commercial uses, as well as a planned BART station, on the Housing Conversion Site. (DEIR pg. 1,4.) Second, the Project includes a general plan amendment to change the land use/transportation diagram designation from Industrial Park to Heavy Industrial on a 13.68-acre site located on the northeast corner of Junction Avenue and Dado Street (2256 Junction Avenue) (“Offsetting Employment Capacity Site”).

In response to the Notice of Preparation (“NOP”), the District stated that if the residential units discussed in the DEIR were constructed, the District would need additional school facilities. The DEIR fails adequately to consider these issues.

Response F2: The DEIR includes the letter sent to the City by the School District in response to the Notice of Preparation (see Appendix H of the DEIR). The letter does not identify where or if the District is proposing a school and the project does not include a specific school or school site. The DEIR does, however, convey the District’s conclusion that future development under the proposed General Plan amendment would contribute to the need for a new school facility or expansion of existing facilities and discusses the property to be dedicated to the School District on the adjacent Flea Market site for the construction of a school (Pages 149-150 of the DEIR). While construction of a new school would be an impact on the physical environment triggering a CEQA analysis, no specific information is yet available on the nearby school site. The FEIR on the Flea Market project generally addresses the impacts of a future school (no design was available when that FEIR was prepared) and no design is available at this time. The school site identified on the Flea Market site will require specific CEQA review to determine impacts and mitigations.

Comment F3: General Failure to Address Impacts on Schools

Although the DEIR provides in-depth analysis of certain impacts of the Project, including a 10-page evaluation of land use, a 10-page evaluation of visual impacts, a 15-page evaluation of vegetation and wildlife, a 15-page evaluation of transportation and circulation, a 10-page evaluation of air quality, and a 10-page evaluation of noise, it devotes only a relatively rote 1 ½ pages to the impact on public schools, and fails entirely to identify the impact on schools as one of the impacts of the Project. The DEIR states that the Offsetting Employment Capacity Site would remain industrial and that “no land use would be allowed on this site that would generate students.” (DEIR pg. 150.) However, the Project changes the industrial designation, and different types of industrial use do have the potential to generate additional students and impact the District’s need for facilities, as acknowledged by the Legislature in imposing statutory fees for commercial construction. The DEIR also essentially disregards the District’s response to the NOP, in which the District, as a responsible agency, informed the City that new school facilities would have to be constructed to accommodate the project.

Response F3: The length of a discussion required about one particular area of impact does not indicate the appropriate quantity or level of analysis that should be set forth on another subject. As stated above in Response F2, the District’s letter is presented in Appendix H of the DEIR. Since the District’s letter does not identify a prospective school site nor any other specifics regarding the school that the District believes it may decide to construct, the DEIR could not evaluate the environmental impacts of constructing a new school. Aside from asserting that a new school will need to be constructed somewhere, the District has not identified any additional environmental related specifics that could be analyzed or disclosed at this time. It is unclear from the comment how and what number of students the District believes would be generated by the change in industrial designation at the Junction Avenue Offsetting Employment site, which is outside the District’s attendance boundaries. The Junction Avenue Offsetting Employment site is located within the Orchard School District. No residential uses would occur at that site, and to the extent that workers on the site have school age children, the children would attend schools based upon the location of their residence, not their parent’s job.

The District’s NOP comment letter, which informed the City that new school facilities would have to be constructed, was taken into account in the analysis and the DEIR correctly identifies the need for a new school and identifies the agreement between the Flea Market site and the School District for the dedication of a school site.

Comment F4: Instead, the DEIR states that the District “has reached an agreement with the San José Flea Market to construct a school on that site to accommodate future students associated with the Flea Market site and other sites in the vicinity anticipated to generate students, possibly including the project site.” (DEIR pg. 150.) This statement is not accurate. The District has reached an agreement with the San José Flea Market for the provision of a school site, but there is no agreement regarding the provision of an actual school. In fact, the District is receiving the school site in lieu of developer fees, which means that there will be no developer fees available to build a school. Thus, the District will need to accommodate the students from the Project either at its currently existing schools, which, as discussed below, are currently at or over capacity, or at a school on the Flea Market property for which adequate construction funds do not yet exist.

Response F4: It is the City’s understanding that the School District has received a land dedication of 3.5 acres from the Flea Market site for the construction of a school. The agreement between the School District and the Flea Market states that no additional fees will be paid by the Flea Market above and beyond the land dedication. Future development under the proposed General Plan amendment and any subsequent development in the project area would, however, be required to pay impact fees which, it is assumed, the District could choose to allocate toward construction of the new school on the Flea Market site.

The statement on page 150 of the DEIR that says the District “has reached an agreement with the San José Flea Market to construct a school on that site to accommodate future students associated with the Flea Market site and other sites in the vicinity anticipated to generate students, possibly including the project site” is misleading and will be revised to reflect the agreement for a land dedication with no provision for a school facility. Please see page 4 of this document for the proposed text amendment.

Comment F5: Instead, while acknowledging that the School District’s existing schools that would serve the Project area are at or beyond capacity and that the Project would generate approximately at least 250 new students who would attend School District schools (a figure the School District contests; see below), the DEIR dismisses the need to construct a new school to serve such students, instead stating “[t]here are a number of methods that can be used to accommodate the increased numbers of students that do not require that new schools be built” and proceeds to list such alleged alternatives (including “the provision of portable or relocatable classrooms” and “the conversion to year-round schools with a four-track schedule”) without further analysis (DEIR pg. 150).

Response F5: This comment is incorrect. The DEIR does not “dismiss” the need to construct a new school. Instead, the DEIR discusses the need for a new school and identifies the agreement between the Flea Market site and the School District for the dedication of a school site. Construction of the new school will require subsequent CEQA review when the location and design are confirmed to allow meaningful environmental analysis.

Because the District has not stated that a new school is currently proposed, nor that the District has taken any action to approve a new school, the DEIR acknowledges that other options may be pursued by the District in lieu of or prior to a new school being constructed.

Comment F6: The DEIR also notes that state law “specifies an acceptable method of offsetting a project’s effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit”, but acknowledges that “the school impact fees and the school districts’ methods of implementing measures specified by Government Code 65996 would *partially* offset project-related increases in student enrollment.” (DEIR pag150; emphasis added.) Finally, the DEIR dismisses the need for further analysis of the impacts of increased student population, stating “further discussing at this time of the impacts that might result from building on or more school in the project area at an unknown location would be speculation.” (DEIR pg.150.)

Response F6: This information is, to the best of the City’s knowledge, accurate. Since the phrase “partially offset” is misleading, it has been deleted from the DEIR text. Please see page 4 of this document for the proposed text amendment.

Comment F7: It is the District’s position that the DEIR is inadequate regarding schools and actual impacts on schools. The preparer of an EIR must make a genuine effort to obtain and disseminate information necessary to the understating of impacts of project implementation. (See VEQA Guidelines § 15151; Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1236.) Additionally, an EIR must set forth a reasonable, detailed and accurate description of existing environmental setting, including both natural and man-made conditions, such as public facilities. (See CEQA Guidelines § 15125 (c) & 15360.)

The DEIR does not meet its informational purpose. The DEIR merely concedes that there will be an increased demand on educational services within the School District, but does not provide an analysis of impacts including but not limited to fiscal impacts resulting from the physical development (e.g. the School District’s ability to obtain developer fees, whether these fees will result in a deficit of funding for the School District, what the effects will be on staffing and curriculum, etc.). For instance, the DEIR does not state the type of residential construction or the average square feet per unit, as requested by the District in its May 1, 2007, response to the NOP. The District needs this information in order to estimate the amount of fees that would be generated by the development. The DEIR also provides no information regarding the School District’s fiscal health, funding sources available to the School District to maintain existing and to build new facilities, school overcrowding or future population projections. No consideration or analysis was given whatsoever to the feasibility or effectiveness of the six suggested “methods” to accommodate students identified in the DEIR. As an example, busing is mentioned, but there is no consideration of whether sufficient capacity exists at other District schools, or the cost or availability of busing. In fact, the District does not currently provide busing (except for special education students), and has no funds available to provide such busing; developer fees may only be used for school construction and reconstruction (Ed. Code §§ 17620, et seq.), and there are no available general funds within the District’s budget.

Response F7: It is not clear from this comment what is intended by the reference to Guidelines Section 15125(c), which refers to the regional setting critical to assessment of environmental impacts, with special emphasis on environmental resources that are rare or unique to the region. The DEIR does identify the capacity in local schools, which is not typically considered part of the regional setting. An analysis of the District’s fiscal health or potential fiscal impacts on the District is not required by any part of CEQA or the CEQA Guidelines unless the fiscal impacts can be traced to direct physical changes in the environment, which the District’s comments do not. The reference in the DEIR to various methods for accommodating students are for informational purposes and are neither prescriptive nor are they intended as suggestions for the District’s use of developers’ fees.

Comment F8: Without knowing the extent and nature of the impact on schools, readers of the DEIR and agencies including the School District are unable adequately to assess the actual impact. Similarly, without knowing more about the specific impacts, it is impossible to formulate meaningful mitigation measures.

Response F8: The DEIR provides all the information presently available that is relevant to an environmental analysis of the proposed project under CEQA, including the number of children anticipated to be generated by future development under the proposed General Plan amendment, the current status of the District's (and other) schools, and that a new school may be required. The DEIR constitutes an analysis of environmental impacts, not educational impacts or purely fiscal impacts, so may not provide information needed to ascertain scholastic program impacts, as noted by the comment.

Comment F9: Specific Failure of DEIR to Examine All Potential Impacts Related to School Facilities

The DEIR failed to provide a thorough examination of all potential impacts related to school facilities, as set forth below.

1. DEIR Does Not Provide an Adequate Description of Existing Facilities or of Student Generation Rates

The DEIR does not provide an adequate description of the existing conditions within the School District, on a school-by-school basis, including size, location and capacity. Instead the DEIR limits its review to stating, without citation, that the School District's "student generation rates are 0.461 children per unit for grades Kindergarten through 8th." (DEIR pg. 149.) Using these rates, the DEIR calculates that the Project "could result in approximately 250 additional students to the Berryessa Union School District, " but goes on to acknowledge that the 2005 enrollment for Vinci Park Elementary School was at capacity, and that Piedmont Middle School was 37 students over capacity in 2005. (DEIR pg. 149.) Current year enrollment at Piedmont remains at capacity (2008 CBEDS – 1,026 students) and Vinci Park has grown since 2005 forcing the district to add portable classrooms on the campus (2008 CBEDS – 716 students).

The DEIR must analyze the location, size, capacity and structure of existing School District facilities as well as providing reasoned data and analysis regarding student generation rates before reaching an informed conclusion regarding the existence and significance of any impacts on the School District from the Project. In fact, the School District does not have adequate facilities to house the students who will eventually reside in the increased residential units generated by the Project.

Response F9: As acknowledged in this comment, the DEIR identifies the physical conditions at the local schools most likely to be attended by students generated by the proposed project, under existing conditions. The DEIR is not required to provide a description of all of the District's facilities on a "school-by-school basis, including size, location and capacity". The DEIR identifies the schools most likely to be used by students from the project site, identified their current status based on information provided by the District. It is not clear from this comment what useful information would be provided by detailing conditions at schools unlikely to be utilized by students from this project, particularly since the DEIR acknowledges that a new school may be required.

The student generation rate is based on information received from the School District in July 2005 based on an analysis by Enrollment Project Consultants (San Mateo, CA).

Comment F10:

2. DEIR Does Not Adequately Describe Enrollment Trends

The DEIR does not adequately describe the School District's past and present enrollment trends. While the DEIR does state the enrollment for the schools affected by the Project, it does not discuss whether enrollment has been increasing, decreasing or sustaining. As a result, the DEIR cannot adequately evaluate the projected future impact the students from the Project will have on the schools over time. In fact, as acknowledged by the DEIR, the affected elementary school (Vinci Park) already exceeds capacity. Also, all of the School District's middle schools are close to capacity, with the affected middle school (Piedmont) already overcrowded with an enrollment of 1,026.

Response F10: Enrollment and population trends are appropriately used by the City and the District for planning purposes. The CEQA Guidelines, however, advise that an EIR "should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the Notice of Preparation is published". It would be inappropriate for an impact analysis to compare a project to conditions in the past or a hypothetical future scenario. As acknowledged by the DEIR and the above comment, the affected elementary school (Vinci Park) already exceeds capacity. Also, all of the School District's middle schools are close to capacity, with the affected middle school (Piedmont) already overcrowded with an enrollment of 1,026. The DEIR evaluates the project's anticipated future student generation against those conditions.

Comment F11:

3. The DEIR Fails to Identify the Cost of Providing Capital Facilities to Accommodate Students on a Per-Pupil Basis.

The DEIR does not identify the cost of providing capital facilities to accommodate students on a per-student basis. Specifically, it does not address the situation of whether the additional students from the Project are going to require additional classrooms which would not otherwise be required absent the Project, resulting in a higher "per-pupil cost." For instance, if a school had three third grade classes, all at capacity, and the Project generated four third graders, the school could have to open an entirely new class to accommodate the four students. The cost associated with the capital facilities to accommodate those four students should be assessed on a per-pupil basis because, without the Project, there would be no need for the additional facilities to serve the project.

Response F11: CEQA does not require an analysis of the cost of mitigation, per se. Mitigation for school impacts is identified and set forth by state law, as stated on page 150 of the DEIR, and it is defined there as a fee. The School District itself, in its response to the Notice of Preparation, states that physical accommodation of the students generated by this project will require a new elementary school, which would be an impact on the physical environment. The DEIR does not question that determination.

Comment F12:

4. DEIR Does Not Identify Any Specific Expected Fiscal Impacts on the School District

The DEIR does not identify any specific expected fiscal impacts on the School District, including an assessment of projected cost of land acquisition, school construction, and other facilities needs. For instance, the potential cost to the School District of acquiring property for the construction of new school facilities within the Project area may be prohibitive. In fact, the School District projects that developer fees will be inadequate to offset the potential fiscal impacts of the Project.

Response F12: CEQA does not require an analysis of fiscal impacts on the District unless those fiscal impacts can be shown to ultimately result in a physical change in the environment, which the comment does not demonstrate. A CEQA analysis is required when the project might trigger the need for a new or physically altered facility.

Comment F13:

5. DEIR Does Not Assess Cumulative Impacts

The DEIR does not assess the cumulative impacts on schools resulting from additional development already approved or pending. Under Public Resources Code section 21083 and CEQA Guidelines 15355, *et seq.*, the City must analyze the cumulative impacts of a proposed project. Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (Guidelines § 15355.) The individual effects may be changes resulting from single project or a number of separate projects. (*Id.* at 15355 (a).) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related part, present, and reasonably foreseeable future projects. (*Id.* At 15355 (b))

In this case, the DEIR does not address the cumulative impact to the School District of this Project together with the development of the Flea Market site, and any other projects that may be pending. The DEIR acknowledges the planned development of the Flea Market site but makes no effort to consider the cumulative impact on the District of both projects. As such, the DEIR fails adequately to assess the impact on schools.

Response F13: The DEIR does address the cumulative impact to schools on page 185, including the recently approved General Plan amendments to allow future mixed-use residential development on the Flea Market property. As stated there, impacts to school facilities would be mitigated through the methods directed by State law, such as payment of impact fees by each of the projects. If new schools are necessary, the construction of multiple schools are not themselves anticipated to result in significant cumulative impacts.

Comment F14:

Specific Failure of DEIR to Analyze Impacts to Schools Other than Facilities

In addition to the impacts on school facilities, CEQA requires an evaluation of Project impacts on all school related services. The SEIR mentions only the facilities requirements. Specifically, the DEIR should address the following issues related to public school services.

1. DEIR Does Not Provide a Description of Projected Staffing Requirements

The DEIR does not provide a description of projected teacher/staffing requirements based on anticipated population growth and existing State and School District policies. This information is critical for the City to assess whether the Project impacts staffing requirements by necessitating additional teachers. Like the capital facilities assessment described in the preceding section, this assessment must be completed on a per-pupil basis.

2. DEIR Does Not Analyze Whether the Project Has Any Impact on Curriculum

The DEIR fails to analyze whether there is any impact on curriculum as a result of anticipated population growth. Specifically, the DEIR should have addressed whether additional programs would now be required (including but not limited to special education and specific general education courses) as a result of the influx of students from the Project, and whether funding exists to provide those programs.

3. DEIR Does Not Assess Each School District's Present and Projected Capital Facility, Operation and Personnel Costs

The DEIR does not assess the School District's present and projects capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted.

Response F14: It is not the role of an EIR under CEQA to enable a lead agency to determine whether or not another government agency can provide services. In the case of impacts on schools and the mitigation for such impacts, the lead agency is specifically directed in its analysis by CEQA and the state government code. Nothing in either law required that a lead agency determine and evaluate the costs of running a school district.

Comment F15:

4. DEIR Does Not Assess Forseeable Impacts on Traffic

To the extent that students in the project would have to be transported to other areas for school, it is foreseeable that traffic and pedestrian safety impacts would arise. The DEIR fails to take into account this reasonably foreseeable impact.

Response F15: No information is provided by the District as to the pattern or amount of busing that might be required or provided by the District, or what other schools might be utilized in this event. Since the District stated that a new school will be required to serve

the students, it is assumed that the District believes that a new school would be constructed proximate to the project site, requiring minimum travel. While busing may remain an option for the District, no specific programs have been identified by the District.

Comment F16:

DEIR's Inadequacy Regarding Mitigation Measures

Based on the deficiencies of the DEIR described above, along with the fact that the DEIR does not identify the expected shortfall between the estimated developer fees to be generated by the Project and the cost of provision of capital school facilities, it is the School District's position that the DEIR improperly fails to identify the impact on schools as a significant, not fully mitigated environmental impact. Under the Government Code, the City has a duty to coordinate with the School District to provide effective school site planning. (Gov. Code §§ 65352 & 65352.2.) The City should consider alternative mitigation measures, such as those proposed below, to fulfill that duty.

State Law Does Not Limit School Impact Mitigation to Developer Fees

The DEIR notes that "State law (Government Code Section 65996) specifies an acceptable method of offsetting a project's effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit." (DEIR pg. 150.) This statement is conclusory and without merit.

In fact, Government Code section 6599 (all subsequent code sections refer to the Government Code unless otherwise specified) does not relieve a city or county from analyzing the impact on schools of a proposed project, concluding that there are significant impacts that may remain unmitigated and further analyzing whether a mitigation measure is available to adequately mitigate the impacts. The Project cannot be approved unless the City either imposes mitigation measures adequate to mitigate identified impacts to a level of less-than-significant or the City adopts an applicable statement of overriding consideration. (Pub. Res. Code § 21002; CEQA Guidelines §§15021 (a) (2), 15091 (a) & 15096 (g); see Sierra Club v. Gilroy City Council (1990) 222 Cal.App. 3d 30.) The developer fees cited by the DEIR would not necessarily mitigate all impacts of this development. Additionally, the DEIR concedes that developer fees would only "partially offset project-related increases in student enrollment" but fails to explore other measures that would alleviate the impact of those increases in student enrollment, or reduce them to a level of less than significant. (DEIR pg. 150.)

Response F16: The statement in the second paragraph of this comment referring to the DEIR reference to state law as being conclusory and without merit, is itself inaccurate and misleading. The DEIR analysis does not simply paraphrase the government code, the DEIR quotes the actual law, including the provision that payment of school impact fees "are hereby deemed to provide full and complete school facilities mitigation" [Section 65996(b)].

The opinion of the letter writer that the state law does not limit a lead agency's responsibility for identifying and requiring other kinds and methods of mitigation is not supported by any case law, regulation, or other legal justification in the public record. The City is required by state law to consider school impact fees as the exclusive means of "considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use or development of real property..." [CGC Section 65996 (a)]. The requested entitlement addressed in this EIR is a General Plan amendment, which is a legislative act under California Law.

The use of the words "partially offset" in the DEIR are misleading and have been deleted from the DEIR text.

Comment F17: The Legislature Intended Coordinated Planning for School Sites

Sections 65352 and 65352.2 require local cities and counties to coordinate planning of school facilities with school districts. The Legislature confirmed that the parties are meant to coordinate "[o]ptions for the siting of new schools and whether or not the local city or counties existing land use element appropriately reflects the demand for public school facilities, and ensures that new planned development reserves location for public schools in the most appropriate locations."

The Legislature recognized that new planned development should take into consideration and even "reserve" where schools would be located to serve the development because schools are as integral a part of planning for new development as is any other public service, such as fire, police, water and sewer. As it relates to this case, the intent behind sections 65350, *et seq.*, supports the District's position that the City must analyze whether the current size of District Schools is adequate to accommodate both its existing population and the new development (which it is not), particularly in light of the cumulative factors addressed in this letter. The City can help the District provide adequate facilities resulting from the impact of the Project, which are not addressed by developer fees, by requiring alternative measures to assure that there is an adequate site to accommodate school facilities.

Response F17: The letter writer's interpretation of the legislature's "intent" behind Section 65350 is not supported by any factual information that has been provided to the City. The City is prepared to cooperate with the District in planning for future schools, including analyzing alternative school sites, if the District identifies what alternative sites are under consideration. The opinion in this comment, that planning for new schools requires "alternative mitigation measures" identified, contrary to state law, in CEQA documents, is not supported by the government code section referenced.

Comment F18: Alternative Measures

Land Dedication

One possible measure would be for the City to consider adopting findings requiring any developer building residential units on the Project site to dedicate land and/or funding pursuant to sections 65970 *et seq.*, which permit the City to retain a developer to dedicate land to a School District. Section 65974 specifically states that "for the purpose of establishing an interim method

of providing classroom facilities where overcrowded conditions exist,...a city, county, or city and county may, by ordinance, require the dedication of land, or the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition of the approval of a residential development.” We note that it appears that the District has an agreement with the Flea Market for the dedication of land for a school site that would serve the students from this Project. However, if for any reason the District does not actually receive the land from the Flea Market, or if the development from this Project occurs before the Flea Market Development, the issue of land dedication would need to be addressed.

A land dedication requirement would be good public planning benefiting all residents of the community, including future residents of the Project. As development occurs, land suitable for new school sites grows scarcer. Under sections 65352 and 65352.2, the City has a duty to help plan for adequate services to their residents by ensuring that future sites are set aside for schools. Failure to do so leads to inadequate services, future controversies, and the potential need for a school district to exercise its rights under eminent domain to displace existing residents.

Finally, land dedication is a permissible mitigation measure under sections 6995, et seq., which are cited by the DEIR. Section 65995, subdivision (a), specifically states that “[e]xcept for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication or other requirement for the construction or reconstruction of school facilities may not be levied....” Section 65995 expressly includes Chapter 4.7, inclusive of section 65974, from this limitation, thus permitting a city to address conditions of overcrowding in school facilities or inadequately sized school sites by requiring, for example, a dedication of land.

Further, the City is authorized by section 66478 of the Subdivision Map Act to require dedication of elementary school sites when needed to address development. Nothing in sections 65995, et seq., precludes such a requirement.

Land dedication is particularly important in the project’s vicinity given the lack of available vacant land for school facilities.

Phasing

Another method by which the City can work cooperatively with the School District within all legal constraints to ensure adequate school facilities with regard to new development is by requiring development to be phased and not permitted prior to availability of school facilities. Timing development so as to balance the availability of school facilities with new development can significantly aid the School District in its attempt to provide for the additional students generated by new development.

Cooperative Use

The City and the School District can also work together to ensure adequate school facilities to serve the residential units contemplated by the Project by entering into a partnership to jointly use school and park land for recreation and educational purposes. It is desirable for both public entities to have land set aside for both school and park use so that a single joint use facility of ten or more acres would be available to both the School District and residents within the Project site.

Again, it appears that the District has an agreement with the Flea Market for the dedication of land for a school site that would be cooperatively used. However, as stated above, if for any reason the District does not actually receive the land from the Flea Market or if the development from this Project occurs before the Flea Market development, the City could aid the School District in its efforts to provide appropriate facilities for the additional students generated by the Project by considering this issue.

Response F18: These various methods for creating and efficiently managing school sites and other public uses are acknowledged as viable future approaches for planning purposes. Since state law precludes the City from considering in a CEQA document methods other than payment of school impact fees as mitigation of CEQA impacts, these alternative ideas are more appropriately explored in a planning process, through consultation between the City, School District, and the affected private property owners.

Comment F19: Conclusion

It is the District's position that the DEIR does not adequately analyze the Project's potential impacts to schools. The DEIR must address with greater specificity the impacts on school facilities and services. The District encourages the City to work cooperatively with the District and consider alternative measures, such as phasing or land dedication, which can adequately address the impacts on the District's schools.

Response F19: The DEIR identifies the likely impacts on the environment which could be created by the project's generation of students that would be served by the Berryessa Union School District. Within the parameters of CEQA and other relevant state law, the DEIR also identifies the appropriate method for mitigating the environmental impacts likely to result from the project.

The District's interests in working with the City to coordinate planning for school sites will be addressed by the City Council and City staff outside the CEQA process.

G. RESPONSE TO COMMENTS FROM KINDER MORGAN, FEBRUARY 1, 2008

Comment G1: This letter is in response to the Notice of Availability of a Draft Environmental Impact Report (EIR) and Public Comment Period we received January 22, 2008, concerning the above referenced project.

Based on the information you have provided, Kinder Morgan has no conflict with the proposed project.

In the event the proposed scope changes, please resubmit your request.

Response G1: This comment is acknowledged. No response is required.

V. COPIES OF THE COMMENT LETTERS RECEIVED ON THE DRAFT EIR

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, GOVERNOR

DEPARTMENT OF TRANSPORTATIONP. O. BOX 23660
OAKLAND, CA 94623-0660
PHONE (510) 286-5536
FAX (510) 286-5559
TTY 711*Flex your power!
Be energy efficient!*

February 20, 2008

SCL-680-M3.84
SCL680108
SCH2007042036Ms. Licinia McMorrow
City of San José
200 East Santa Clara Street
San José, CA 95113

Dear Ms. McMorrow:

1610 - 1650 Berryessa Road General Plan Amendment - Draft Environmental Impact Report (DEIR)

Thank you for continuing to include the California Department of Transportation (Department) in the environmental review process for the proposed project. We have reviewed the DEIR and have the following additional comments to offer.

Community Planning

Table 6, Page 100, shows that the project will contribute additional trips on segments of US 101 that are already below LOS D. In order to encourage use of the future BART line as an alternative to driving and thereby lessen these additional project-related traffic impacts on US 101, we suggest that the pedestrian and bicycling connection between the existing housing development on the north side of Berryessa Road (east of the railroad track) and the future BART station be improved. In order to do this, consider providing a pedestrian and bicycle connection from the ends of Fern Pine Court and Heavenly Bamboo Court to the edge of the railroad right-of-way, along which right-of-way could potentially be preserved for a pedestrian and bicycle path leading to Berryessa Road with an improved, safe crossing to the future BART station site.

In addition, we note that the analysis of cumulative impacts shows significant unmitigated impacts on state highway facilities. The approved San Jose Flea Market project is in the vicinity of the future BART station at Berryessa Road and is one of the projects included in the cumulative impact analysis. In order to encourage use of the future BART line as an alternative to driving and thereby lessen cumulative impacts on state highways in the GPA area, consider providing a sidewalk along the north side of Berryessa Road between the San Jose Flea Market and the future BART station, if not already planned. Ideally, this would be of adequate width and buffered from traffic in order to facilitate access to the future BART station.

Traffic Forecasting**Trips Generated Required**

We understand the report adopts the City of San Jose's traffic forecasting model. The Department would like to see the number of generated trips resulting from the Berryessa Road

"Caltrans improves mobility across California"

Ms. Licinia McMorrow
February 20, 2008
Page 2

(Rd.) General Plan Amendment (GPA) using this model. If the project-generated trips are more than 100 vehicles per hour (vph), a traffic impact study (TIS) is required as noted in our letter dated April 27, 2007.

Complete Traffic Impact Study Required

The Berryessa Rd. GPA, bounded by N. King Rd and Berryessa Rd., with a maximum land use available of 9.87 acres requires a complete TIS. LOS E/F link under link set 3-East of US 101 in Tables 5 and 6 indicates a volume increase of 191 and 151 vehicles per hour (vph) and the V/C change is over 0.01 during AM and PM peak hours. The GPA would have significant traffic impacts on the interchanges of Berryessa and US 101 and I 680. Therefore, we would expect a TIS, inclusive of turning movement traffic and LOS for these interchanges. The TIS should also include the LOS of basic freeway segments for US 101 between Mabury Rd. and Oakland Rd. and I 680 between Mabury Rd. and Hostetter Rd.

Traffic Impact Study for the Second proposed GPA

The TIS in the DEIR is for the housing conversion site only. The Department requests an additional TIS for the second proposed GPA, the offsetting employment capacity site, located on approximately 13.68 acres at the corner of Junction Avenue and Dado Street in the City of San José.

Project Only, Cumulative plus Project Conditions Required For CEQA Document

The Department notes the winter 2007 cumulative analysis presented in this report. However, the winter 2007 analysis is actually the current year traffic study, and as such, cannot substitute for the 2025 cumulative traffic impact study. Consequently, the report omits the 2025 cumulative traffic impact study and is incomplete. The cumulative and cumulative plus project traffic impact studies are required. Please include in the TIS the Project Only Conditions, Cumulative Conditions, and Cumulative plus Project Conditions.

Highway Operations

1. Project Scenario Analysis, page 97: On state routes that are at Level of Service (LOS) F any additional trips would be a significant impact and would need to be mitigated. A roadway at LOS F would be operating at congested conditions and any additional trips would add to the existing delay and queuing on the roadway, causing a significant impact.
2. Table 5 and 6, Pages 99-100. The capacities used in this table are incorrect. For High Occupancy Vehicle (HOV) lanes the capacity is 1650 vph, for mixed-flow or general-purpose lanes the capacity is approximately 200 vehicles per hour per lane (vphpl). The capacity of an auxiliary lane is the lesser of the on-ramp or off-ramp. This table needs to be updated based on these capacities and the impacts need to be re-evaluated.
3. Table 5 and 6, Pages 99-100, How would volumes on the freeways decrease with this project? This does not seem feasible when a development is being proposed.
4. Transportation Impacts from the Offsetting Employment Capacity Site, page 102. The report states: *The current land use designation would allow approximately 726 jobs on the site. The proposed Heavy Industrial designation would allow approximately 246 jobs on site. The net loss of jobs on the site would result in fewer daily trips.* Is there a current development

Ms. Licinia McMorrow
February 20, 2008
Page 3

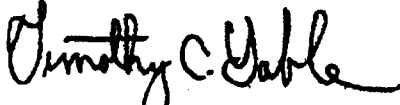
on this site with approximately 726 jobs or is this site vacant? If it is vacant then you cannot say that there would be a net loss of jobs and a traffic impact study must be done. In addition, existing and background traffic volumes will have changed since the initial land use designation and therefore the current proposal of the Offsetting Employment Capacity site needs to be analyzed with these latest traffic volumes to determine if this development will cause any significant impacts.

5. Page 104, Conclusion, As this development is causing a significant impact to the roadway links, the impacts to the state routes must be mitigated or fair share fees must be collected for mitigation implementation.
6. Analysis of Cumulative Impacts, Section 6.3: Significant impacts to state routes under cumulative conditions must be mitigated or fair share fees must be collected for mitigation implementation.
7. Appendix D, Figure 2a and 2b, Explain how the volumes on the freeway would decrease under the project conditions when all of the roads leading to the freeway would have increased volumes. There is a need to analyze more than one freeway segment on both US 101 and I 680.

Additional comments, if any, from our Design unit will be forwarded as soon as they are received.

Should you require further information or have any questions regarding this letter, please call José L. Olveda of my staff at (510) 286-5535.

Sincerely,



TIMOTHY C. SABLE
District Branch Chief
IGR/CEQA

c: Scott Morgan (State Clearinghouse)

Sent By: CALTRANS TRANSPORTATION PLANNING; 510 286 5560;
To: CITYSANJOSE At: 914082926055

Feb-25-08 11:55AM;

Page 1/1

STATE OF CALIFORNIA — BUSINESS, TRANSPORTATION AND HOUSING AGENCYARNOLD SCHWARZENEGGER, GOVERNOR**DEPARTMENT OF TRANSPORTATION**

P. O. BOX 23660
OAKLAND, CA 94623-0660
PHONE (510) 286-5586
FAX (510) 286-5559
TTY 711



*Flex your power!
Be energy efficient!*

February 25, 2008

SCL-680-M3.84
SCL680108
SCH2007042036

Ms. Licinia McMorrow
City of San José
200 East Santa Clara Street
San José, CA 95113

Dear Ms. McMorrow:

1610 – 1650 Berryessa Road General Plan Amendment – Draft Environmental Impact Report (DEIR), Correction to comments of February 20, 2008.

Thank you for continuing to include the California Department of Transportation (Department) in the environmental review process for the proposed project. On February 20, 2008, we sent you our comment letter on the DEIR. This letter is a follow-up to provide you with a **correction (in bold)** on our Highway Operations comment #2 as follows:

Highway Operations

2. Table 5 and 6, Pages 99-100. The capacities used in this table are incorrect. For High Occupancy Vehicle (HOV) lanes the capacity is 1650 vph, for mixed-flow or general-purpose lanes the capacity is approximately **2000** vehicles per hour per lane (vphpl). The capacity of an auxiliary lane is the lesser of the on-ramp or off-ramp. This table needs to be updated based on these capacities and the impacts need to be re-evaluated.

Additional comments, if any, from our Design unit will be forwarded as soon as they are received.

Should you require further information or have any questions regarding this letter, please call José L. Olveda of my staff at (510) 286-5535.

Sincerely,

for

TIMOTHY C. SABLE
District Branch Chief
IGR/CEQA

cc: Scott Morgan (State Clearinghouse)

County of Santa Clara

Parks and Recreation Department

298 Garden Hill Drive
Los Gatos, California 95032-7669
(408) 355-2200 FAX 355-2290
Reservations (408) 355-2201
www.parkhere.org



February 28, 2008

City of San Jose
Attn: Licinia McMorrow
San Jose City Hall
200 East Santa Clara Street, Tower, 3rd Floor
San Jose, CA 95113-1905

SUBJECT: Draft Environmental Impact Report (DEIR) for the Berryessa General Plan Amendment

PROJECT APPLICANT: UBS Realty Investors LLC
FILE NO: GP06-04-05
APNs: 254-17-066, -067, -068, -069, -070
Address(es): 1610, 1620, 1630, 1640, 1650 Berryessa Road, San Jose, CA

Dear Ms. McMorrow:

The Santa Clara County Parks and Recreation Department has reviewed the DEIR for the Berryessa General Plan Amendment. It is the intent of the DEIR to evaluate a General Plan land use designation change on the project site from Light Industrial to Transit corridor Residential (20+DU/Ac). We have focused on potential significant impacts related to the Santa Clara County Countywide Trails Master Plan routes and with potential impacts to the Penitencia Creek Park Chain. We offer the following comments:

Section 3.0 Consistency with Adopted Plan and Policies:

Consistency with the Joint Use Agreement for the Penitencia Creek Park Chain

The DEIR should discuss consistency with, or impacts as a result of, any changes in Land Use Designation with the Joint Use Agreement for the Penitencia Creek Park Chain, a portion of which is adjacent to the project site on the north and east sides on parcels adjacent parcels owned by the Santa Clara Valley Water District. A Tri-party agreement for the development of the Penitencia Creek Park Chain for recreation and flood control infrastructure is in effect between Santa Clara County, the City of San Jose, and the Santa Clara Valley Water District (SCVWD). This agreement was approved by the County Board of Supervisors, the San Jose City Council and the SCVWD Board of Directors to ensure that the Penitencia Creek Trail, from Coyote Creek to Alum Rock Park, shall be developed, operated, and maintained through the cooperation of the three entities and that future development would interface appropriately with the Park Chain.

Consistency with the Penitencia Creek Park Master Plan

The DEIR should discuss consistency with the policies of the *Penitencia Creek Park Master Plan*, approved by the County Board of Supervisors in 1977. The *Penitencia Creek Park Master Plan* was an outgrowth of the Joint Use Agreement for the Penitencia Creek Park Chain and serves as a guide for future improvements



Board of Supervisors: Donald F. Gage, Blanca Alvarado, Peter McHugh, Ken Yeager, Liz Kniss
County Executive: Peter Kutas, Jr.

along Penitencia Creek The project site is within the planning area of the *Penitencia Creek Park Master Plan*.

Consistency with the Santa Clara County Countywide Trails Master Plan

While the DEIR has identified consistency with the City's Trails and Pathways Policy No.1, the DEIR should acknowledge the County's General Plan policies regarding countywide trails and the guidelines of the *Santa Clara County Countywide Trails Master Plan Update (Countywide Trails Master Plan)*, approved by the County Board of Supervisors as part of the Parks and Recreation Element of the County of Santa Clara General Plan (1995-2010). The DEIR should describe the following countywide trail route within and adjacent to the project site:

- **Bay Area Ridge Trail: El Sombroso/Penitencia**, (Route R5-C) - Designated as trail route within other public lands for hiking, off road cycling, and equestrian. This trail route lies within a small portion of the northern site area and adjacent to the project site to the west and parallels Penitencia Creek. The trail would provide added benefit for alternative transportation access to the Bay Area Rapid Transit alignment and station proposed adjacent to the subject project.

Section 4.8 Environmental Setting, Impacts and Mitigations: Transportation and Circulation

Opportunities for expansion of non-motorized transportation routes

In light of the proposed General Plan Land Use designation change, the Transportation and Circulation section of the DEIR should address the opportunities to expand non-motorized transportation and circulation routes given the location of the previously noted the trail routes and park chain immediately adjacent to the proposed project site. The trail alignment offers opportunities for non-motorized transportation connections with the surrounding neighborhoods, proposed BART station, schools, parks and open space areas.

The Parks and Recreation Department appreciates the opportunity to review and submit comment on the DEIR for the Berryessa General Plan Amendment. If you have any questions regarding these comments, please contact me at (408) 355-2236 or by email at Elish.Ryan@prk.sccgov.org.

Sincerely,

Elish Ryan
Park Planner

Enclosure: Penitencia Creek Park Chain Joint Use of Lands Agreement

cc: Jane Mark, Senior Planner, Santa Clara County Parks and Recreation

Project File: GP06-04-05



Board of Supervisors: Donald F. Gage, Blanca Alvarado, Peter McHugh, Ken Yeager, Liz Kniss
County Executive: Peter Kutas, Jr.



February 29, 2008

City of San Jose
Department of Planning and Building
200 East Santa Clara Street
San Jose, CA 95113

Attention: Licia McMorrow

Subject: City File No. GP06-04-05 / Berryessa Road General Plan Amendment

Dear Ms. McMorrow:

Santa Clara Valley Transportation Authority (VTA) staff have reviewed the Draft EIR for a General Plan change to Transit Corridor Residential (20+ du/ac) on 13.64 acres and to Heavy Industrial on 13.68 acres at the southwest corner of Berryessa Road and King Road. We have the following comments.

BART Berryessa Station Transit Oriented Development (TOD)

The proposed General Plan amendment does not sufficiently support future Transit Oriented Development (TOD) potential for the future BART Berryessa Station area. The Draft Silicon Valley Rapid Transit (SVRT) Station Areas Vision Plan document identifies this site for mixed-use development, and auxiliary station facilities including a bus transit center, shuttle bays, and kiss-and-ride areas.

Additionally, the City of San Jose has requested consideration of developing the future BART stations as mixed-use transit villages that have both jobs and households. The approved San Jose Flea Market Mixed Use Transit Village located west of the future BART Berryessa Station proposes mixed-uses and residential densities of approximately 55 du/ac. VTA recommends similar development patterns east of the future BART station.

The San Jose General Plan defines areas within a 3,000-foot radius from a planned BART station as with a "BART Station Area Node." This allows the City to promote and direct transit-oriented and pedestrian friendly land uses. The General Plan defines a "Berryessa Station Area Node" in which development of the BART station is encouraged to be coordinated with development of adjacent and surrounding properties. The Berryessa Station Area Node policy plans for a mix of job generation land uses, high-density residential, supportive commercial uses, and park/open spaces in the location of this General Plan amendment. The "San Jose Flea Market Mixed Use

City of San Jose
February 29, 2008
Page 2

Transit Village" was planned in accordance with these General Plan policies, and this site should follow the applicable General Plan Station Area Node land use policies that support similar TOD development.

As stated in the comments made by VTA for the Berryessa Road GPA Notice of Preparation, a minimum project net density (i.e. excluding land for parks and roads) of 55 du/ac is required for this site. VTA supports higher development densities in order to support the planned future transit investment.

Conflicts with the BART Extension

As stated in the comments made by VTA for the Berryessa Road GPA Notice of Preparation (May 2, 2007), VTA is planning to construct the Berryessa Station, Berryessa Station Transit Center, and various BART auxiliary facilities in support of the BART Extension in the area proposed for this General Plan amendment. Attached are conceptual plans from the previously approved BART Extension Final and Supplemental EIR that show the BART improvements for this area. These proposed BART facilities would conflict with development on portions of this site.

Transportation System Planning and Design

Freeway Segments

As part of the long-range analysis, VTA recommends including segments of US 101 between Old Oakland Road and I-680/I-280.

Transportation Impact Analysis Review

VTA's Congestion Management Program (CMP) requires a Transportation Impact Analysis (TIA) for any specific project that is expected to generate 100 or more new peak-hour trips. Based on the information provided on the size of these projects, TIAs may be required. VTA's *Transportation Impact Analysis Guidelines* should be used when preparing the TIAs. This document includes the analysis of bicycle facilities, parking, site circulation and pedestrian access, as well as roadways, and may be downloaded from [www.vta.org/news/vtacmp/Technical Guidelines](http://www.vta.org/news/vtacmp/TechnicalGuidelines).

02/29/2008 14:32 4083215787

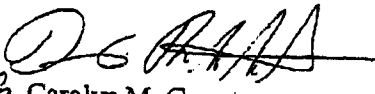
ENVIRON ANALYSIS

PAGE 03

City of San Jose
February 29, 2008
Page 3

Thank you for the opportunity to review this project. If you have any questions, please call Roy Molseed at (408) 321-5784.

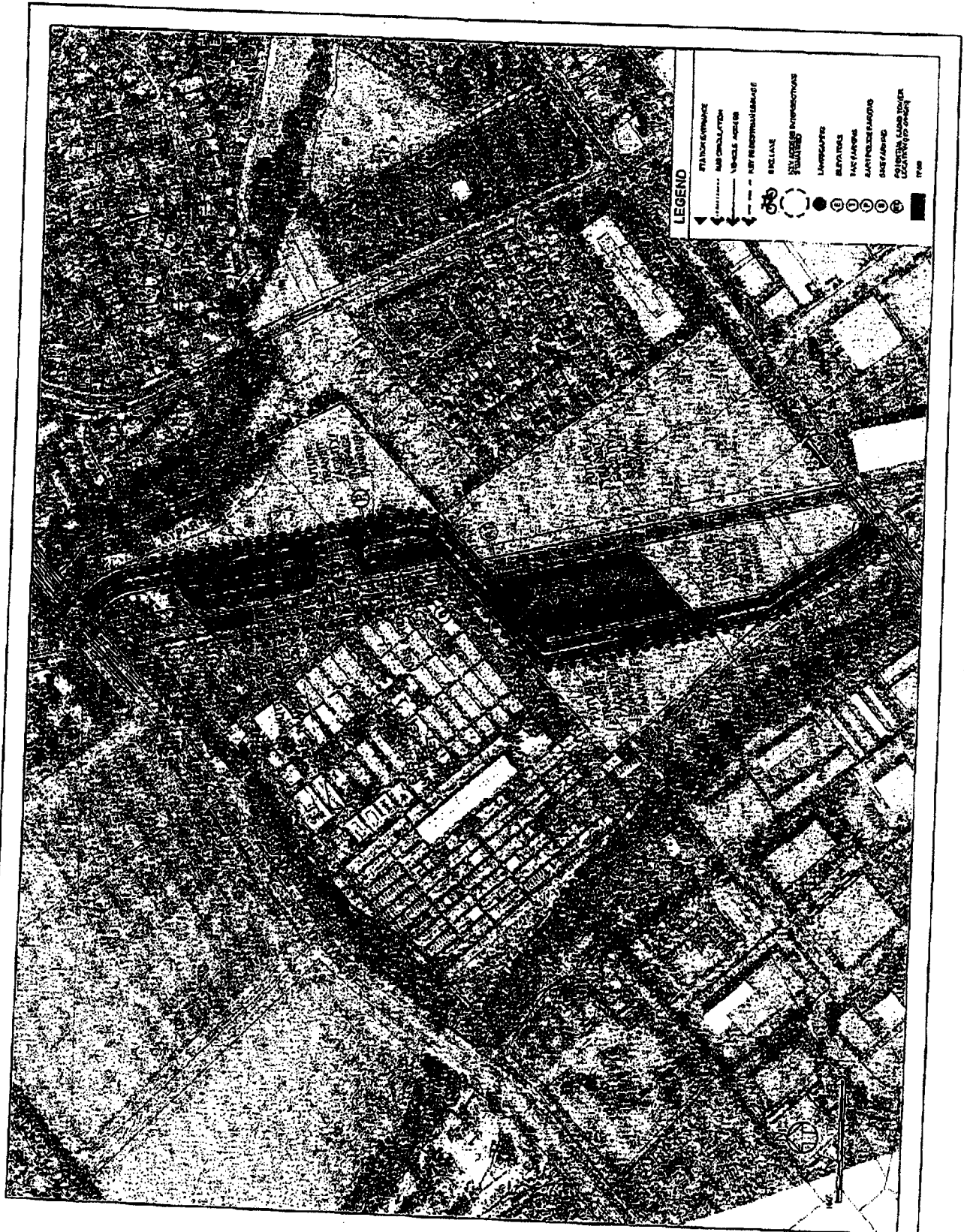
Sincerely,


Carolyn M. Gonot
Chief SVRT Program Officer

CMG:RM:kh

cc: Councilmember Nora Campos, VTA Board Member
Councilmember Dave Cortese, VTA Board Member
Councilmember Nancy Pyle, VTA Board Member
Mayor Chuck Reed, VTA Board Member
Councilmember Forrest Williams, VTA Board Member
Ebrahim Sohrabi, San Jose Development Services

SJ0713



PARKING STRUCTURE WITH SURFACE PARKING OPTION

SITE PLAN

SVRTC

SILICON VALLEY RAPID TRANSIT CORRIDOR

BERRYESSA STATION
27SEP07



EARTH TECH



Figure D-

File: 1706
Upper Penitencia Creek

March 3, 2008

Ms. Licia McMorrow
Department of Planning, Building,
and Code Enforcement
City of San Jose
200 East Santa Clara Street
San Jose, CA 95113

Subject: Draft Environmental Impact Report(DEIR) for the Berryessa Road General Plan
Amendment, GP06-04-05/GP07-04-04

Dear Ms. McMorrow:

The Santa Clara Valley Water District (District) has reviewed the subject document, received on January 17, 2008.

File No. GP07-04-04

This project location is not adjacent to any District facilities; therefore, a District permit is not required.

File No. GP06-04-05

This project location is bounded by the District's Upper Penitencia Creek to the north and east and the District's Central Pipeline, a 66-inch diameter raw water line, to the west. In accordance with District Ordinance 06-1, any plans for construction over the District's fee or easement land rights should be sent to us for review and issuance of a permit.

Additional comments are as follows:

Page 55, last paragraph, mentions the U.S. Army Corps of Engineers'(Corps) "feasibility study and Environmental Impact Report/Environmental Impact Statement(EIR/EIS), which are scheduled for completion by December 2007 and June 2008, respectively." These dates are no longer current and this statement needs to be revised, since the Corps is working to have draft reports by September 2009.

Ms. Licinia McMorrow
Page 2
March 3, 2008

Page 56, first paragraph, states that "the currently preferred alternative is a widened Penitencia Creek channel and floodplain with floodwalls". Please note that this alternative is currently the District's recommended alternative.

Page 56, first paragraph, also mentions Berryessa Creek. This creek name should be revised to Upper Penitencia Creek.

It is the District's understanding that the City of San Jose (City) is aware that the Valley Transportation Authority (VTA) is evaluating the area for a park and ride lot to service the future Berryessa Silicon Valley Rapid Transit (SVRT) Station. The District has been in discussions with the VTA on their proposed station and the needs of the future flood project.

Appendix G, February 14, 2007 Letter for Water Supply Assessment (WSA): It appears in this letter from San Jose Water Company (SJWC) signed by Mr. Bill Tuttle to Mr. Michael Sheehy that the projected water demand (305 Acre-feet/year at build-out) from the proposed development is included in the SJWC's 2005 Urban Water Management Plan. Please submit the finalized version of the WSA for our review. Our expectation is that aggressive water conservation and recycled water use will be pursued as part of this proposed development.

The District is the principal wholesaler of treated water in Santa Clara county and manages the groundwater sub-basins. In the future, we request that WSA drafts be routed to us for review before the Draft EIR to ensure compliance with water code Section 10910 (SB610). Generally, we ask to review any proposed development with a minimum of 500 proposed dwellings and/or 200 acre-feet/year at build-out.

Page 64, bottom of page, states "Seven special status plant species are known to occur in the vicinity of the project site". Please provide a table listing these species along with their habitat requirements and potential occurrence in the study area, with rationale as to why these taxa are unlikely to be present (similar to Table 2). Alternatively, please list species in text and reference Table 1 in Appendix B. This information should be present in the text of the DEIR to fully document rationale for lack of significant impact.

Appendix B, page 1, paragraph 1: The District usually finds *Juglans californica* var. *hindsii*, northern California black walnut, not *J. californica* var. *californica* (southern Ca black walnut). Please revise text, as appropriate.

Appendix B, page 4, last paragraph: Black walnut is not native to our area.

Appendix B, page 6, second paragraph; and page 8, Table 1: Does Table 1 provide a comprehensive list of special status plant species? Only Threatened & Endangered species are listed. What about California Native Plant Society (CNPS) List species?

Page 8, Table 1: Occurrence in the study area cannot be definitively listed as "Absent" since comprehensive botanical surveys of the study area were not conducted during appropriate

Ms. Licinia McMorrow
Page 3
March 3, 2008

bloom period—and it is not clear if any botanical surveys were conducted at all. Table should be revised to read “Likelihood of Occurrence Presumed Low”.

Appendix B, page 19, Section 3.3.1: It does not appear that any botanical surveys of the project sites were performed. Therefore, it appears that there is an assumption that none of the species occur in the project areas. Please add rationale about low likelihood due to lack of suitable habitat.

Appendix B, page 21, Section 3.3.4, states “And, with the possible exception of the western pond turtle, the site does not represent a significant movement corridor for native wildlife.” This statement is incomplete. This section of stream along Upper Penitencia Creek is also an extremely valuable migratory corridor for Federally Threatened Steelhead. Minimization of impacts to in-stream habitat should be discussed here and possible mitigation measures should also be discussed.

Page 63, fourth paragraph: Black walnut is described as being a native tree, but is not considered so by the CNPS. Most are escapes from orchards.

Page 71, second paragraph; and page 75, ninth paragraph: Add reference that the project should be consistent with the recommendations developed by the Water Resources Protection Collaborative in the “Guidelines and Standards for Land Use Near Streams”.

Page 75, Section 4.5.3.1, Mitigation and Avoidance Measures, General Plan Policies: The general plan policies bulleted here appear to overlook an important potential ecological impact - the detrimental impact of the tree species chosen for landscaping and tree replacement on the projects. The sustainability of the riparian forest on Upper Penitencia Creek can be strongly impacted by the neighboring landscape trees through:

- a) pollen exchange and hybridization between non-local ecotypes or ornamental cultivars used in landscaping and the native riparian trees
 - e.g. Lombardy poplar in the project landscape can pollinate native Fremont cottonwoods on the creek and the offspring will naturalize the creek, degrading the natural riparian habitat
- b) invasive fruits and seeds vectored to the creek by wind, birds, animals
 - e.g. fruiting ‘ornamental’ plums, fruiting ‘ornamental’ olives, holly oak, Italian buckthorn, pyracantha, etc.

Design Guides 1 through 5 of Chapter 4 of the aforementioned “Guidelines and Standards for Land Use Near Streams” provide an overview for selection of landscape species compatible with native habitat. District staff would also be pleased to provide more specific information. The project environmental planner and/or landscape architect is welcome to call Linda Spahr, District revegetation biologist, at (408) 265-2607, extension 2752. Because the future capital project with riparian mitigation will be constructed immediately adjacent the proposed Berryessa

Road projects, the District seeks the City's cooperation in ensuring the success in the natural ecology of the neighborhood.

There should be no overbank drainage from the developed portions of the site into the creek. For developed portions of the site, storm water runoff should be collected and distributed to the city's storm drain system. If an outfall into the creek is needed, the outfall design should be consistent with those found in the aforementioned "Guidelines and Standards for Land Use Near Streams".

A Hydromodification Management Plan (HMP) should be implemented in compliance with the Santa Clara Valley Urban Runoff Pollution Prevention Program's (SCVURPPP) National Pollutant Discharge Elimination System (NPDES) permit, including the October 2001 RWQCB Order 01-119 amending the Program's C.3 permit provisions regarding new development and redevelopment requirements. In particular, per C.3 provisions the project should be required to treat its stormwater and shall not increase stormwater runoff rates or durations when such increases will result in an increased potential for erosion or other adverse impacts to beneficial uses.

Post-construction water quality mitigation needs to be implemented. The design of the project area should incorporate water quality mitigation measures such as those found in the "Start at the Source-Design Guidance Manual for Stormwater Quality Protection," prepared for the Bay Area Stormwater Management Agencies Association.

For sites greater than one acre, the developer must file a Notice of Intent to comply with the State's NPDES General Permit for Storm Water Discharges Associated with Construction Activity with the State Water Resources Control Board. The developer must also prepare, implement, and maintain a Storm Water Pollution Prevention Plan (SWPPP) and provide measures to minimize or eliminate pollutant discharges from construction activities.

To prevent pollutants from construction activity, including sediments, from reaching Upper Penitencia Creek, please follow the Santa Clara Urban Runoff Pollution Prevention Program's recommended Best Management Practices for construction activities, as contained in "Blueprint for a Clean Bay," and the "California Storm Water Best Management Practice Handbook for Construction."

The proposed development within the existing floodplain should not increase the 100-year water surface elevation on surrounding properties nor should it increase existing flooding. The site grading must be designed to allow for the passage and storage of flood water within the site. A flood plain analysis will need to be prepared to delineate the post development floodplain depth and lateral extent.

District records show two wells on the site. In accordance with the District Ordinance 90-1, the owner should show any existing well(s) on the plans. If a well is located on the site during construction activities, it must be protected or properly destroyed in accordance with the District's standards. Property owners or their representatives should call the Wells and Water

Mc. Licinia McMorrow
Page 5
March 3, 2008

Production Unit at (408) 265-2607, extension 2660, for more information regarding well permits and registration or destruction of any wells.

Please submit two sets of improvement plans when available for our review and issuance of a permit. The submittal should include grading and drainage, fencing, landscaping and irrigation plans.

Please reference File No. 1706 on further correspondence regarding the project.

Should you have any questions, please give me a call at (408) 265-2607, extension 2494 or email me at THipol@valleywater.org.

Sincerely,

Theodore Hipol
Assistant Engineer
Community Projects Review Unit

cc: Ms. Dionne Early
Planning Division
Department of Planning, Building,
and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113-1905

Ms. Elish Ryan
Santa Clara County Parks and Recreation Department
298 Garden Hill Drive
Los Gatos, CA 95032

S. Tippets, S. Yung, T. Hipol, M. Klemencic, G. Fowler, S. Bui, S. Katric, L. Spahr, L. Porcella, J. Hillman, J. Castillo, D. Duran, File (2)

1706_50315TH03-03

FEB-29-2008 FRI 09:56 AM BERRYESSA UNION SCH DIST FAX NO. 408 926 8329

P. 02

Marc B. Liberman, Ph.D.
Superintendent

1376 Piedmont Road
San Jose, CA 95132-2498



Phone: (408) 923-1800
Fax: (408) 259-3888

February 28, 2008

By U.S. Mail and Facsimile: 408-292-6055

Licinia McMorro
Department of Planning, Building & Code Enforcement
200 East Santa Clara Street, Tower 3rd Floor
San Jose, CA 95113

Re: Comments of Berryessa Union School District on Draft Environmental Impact Report for Berryessa Road General Plan Amendment

Dear Ms. McMorro:

This letter provides comments on behalf of Berryessa Union School District ("School District" or "District") on the Draft Environmental Impact Report dated January 2008 ("DEIR"), prepared for the Berryessa Road General Plan Amendment, file numbers GP06-04-05 and GP07-04-04 ("Project").

The Project proposes amendments to the City of San Jose General Plan and rezoning that would, among other things, allow for the future development of up to 2,818 residential units at the Project site. In a letter dated May 1, 2007, in response to the Notice of Preparation ("NOP") for the DEIR, the School District stated that if such an increase in residential units within the School District occurs, the School District will need to construct a new school to accommodate the students generated by that development. The DEIR fails to adequately consider these issues.

According to the DEIR, the Project is twofold. First, the Project makes a general plan amendment to change the land use/transportation diagram designation from Light Industrial to Transit Corridor Residential on a 13.64-acre site approximately 770 feet southwest from the intersection of Berryessa Road and North King Road (1610 - 1650 Berryessa Road) ("Housing Conversion Site"). The DEIR analyzes a development of approximately 543 residential units and 102,648 square feet of commercial uses, as well as a planned BART station, on the Housing Conversion Site. (DEIR pg. 1, 4.) Second, the Project includes a general plan amendment to change the land use/transportation diagram designation from Industrial Park to Heavy Industrial on a 13.68-acre site located on the northeast corner of Junction Avenue and Dado Street (2256 Junction Avenue) ("Offsetting Employment Capacity Site").

In response to the Notice of Preparation ("NOP"), the District stated that if the residential units discussed in the DEIR were constructed, the District would need additional school facilities. The DEIR fails adequately to consider these issues.

Licinia McMorrow
Department of Planning, Building & Code Enforcement, City of San Jose
February 23, 2008
Page 2

General Failure to Address Impacts on Schools

Although the DEIR provides in-depth analysis of certain impacts of the Project, including a 10-page evaluation of land use, a 10-page evaluation of visual impacts, a 15-page evaluation of vegetation and wildlife, a 15-page evaluation of transportation and circulation, a 10-page evaluation of air quality, and a 10-page evaluation of noise, it devotes only a relatively rote 1 1/2 pages to the impact on public schools, and fails entirely to identify the impact on schools as one of the impacts of the Project. The DEIR states that the Offsetting Employment Capacity Site would remain industrial and that "no land use would be allowed on this site that would generate students." (DEIR pg. 150.) However, the Project changes the industrial designation, and different types of industrial use do have the potential to generate additional students and impact the District's need for facilities, as acknowledged by the Legislature in imposing statutory fees for commercial construction. The DEIR also essentially disregards the District's response to the NOP, in which the District, as a responsible agency, informed the City that new school facilities would have to be constructed to accommodate the project. Instead, the DEIR states that the District "has reached an agreement with the San Jose Flea Market to construct a school on that site to accommodate future students associated with the Flea Market site and other sites in the vicinity anticipated to generate students, possibly including the project site." (DEIR pg. 150.) This statement is not accurate. The District has reached an agreement with the San Jose Flea Market for the provision of a school site, but there is no agreement regarding the provision of an actual school. In fact, the District is receiving the school site in lieu of developer fees, which means that there will be no developer fees available to build a school. Thus, the District will need to accommodate the students from the Project either at its currently existing schools, which, as discussed below, are currently at or over capacity, or at a school on the Flea Market property for which adequate construction funds do not yet exist.

Instead, while acknowledging that the School District's existing schools that would serve the Project area are at or beyond capacity and that the Project would generate approximately at least 250 new students who would attend School District schools (a figure that the School District contests; see below), the DEIR dismisses the need to construct a new school to serve such students, instead stating "[t]here are a number of methods that can be used to accommodate the increased numbers of students that do not require that new schools be built" and proceeds to list such alleged alternatives (including "the provision of portable or relocatable classrooms" and "the conversion to year-round schools with a four-track schedule") without further analysis (DEIR pg. 150).

The DEIR also notes that state law "specifies an acceptable method of offsetting a project's effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit", but acknowledges that "the school impact fees and the school districts' methods of implementing measures specified by Government Code 65996 would *partially* offset project-related increases in student enrollment." (DEIR pg. 150; emphasis added.) Finally, the DEIR dismisses the need for further analysis of the impacts of increased student population, stating "further discussion at this time of the impacts that might result from building one or more schools in the project area at an unknown location would be speculative." (DEIR pg. 150.)

Licinia McMorrow
Department of Planning, Building & Code Enforcement, City of San Jose
February 28, 2008
Page 3

It is the District's position that the DEIR is inadequate regarding schools and actual impacts on schools. The preparer of an EIR must make a genuine effort to obtain and disseminate information necessary to the understanding of impacts of project implementation. (See CEQA Guidelines § 15151; Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 1236.) Additionally, an EIR must set forth a reasonable, detailed and accurate description of existing environmental settings, including both natural and man-made conditions, such as public facilities. (See CEQA Guideline §§ 15125 (c) & 15360.)

The DEIR does not meet its informational purpose. The DEIR merely concedes that there will be an increased demand on educational services within the School District, but does not provide an analysis of impacts including but not limited to fiscal impacts resulting from the physical development (e.g. the School District's ability to obtain developer fees, whether these fees will result in a deficit of funding for the School District, what the effects will be on staffing and curriculum, etc.). For instance, the DEIR does not state the type of residential construction or the average square feet per unit, as requested by the District in its May 1, 2007, response to the NOP. The District needs this information in order to estimate the amount of fees that would be generated by the development. The DEIR also provides no information regarding the School District's fiscal health, funding sources available to the School District to maintain existing and to build new facilities, school overcrowding or future population projections. No consideration or analysis was given whatsoever to the feasibility or effectiveness of the six suggested "methods" to accommodate students identified in the DEIR. As an example, busing is mentioned, but there is no consideration of whether sufficient capacity exists at other District schools, or the cost or availability of busing. In fact, the District does not currently provide busing (except for special education students), and has no funds available to provide such busing; developer fees may only be used for school construction and reconstruction (Ed. Code §§ 17620, et seq.), and there are no available general funds within the District's budget.

Without knowing the extent and nature of the impact on schools, readers of the DEIR and agencies including the School District are unable adequately to assess the actual impact. Similarly, without knowing more about the specific impacts, it is impossible to formulate meaningful mitigation measures.

Specific Failure of DEIR to Examine All Potential Impacts Related to School Facilities

The DEIR failed to provide a thorough examination of all potential impacts related to school facilities, as set forth below.

1. DEIR Does Not Provide an Adequate Description of Existing Facilities or of Student Generation Rates

The DEIR does not provide an adequate description of the existing conditions within the School District, on a school-by-school basis, including size, location and capacity. Instead the DEIR limits its review to stating, without citation, that the School District's "student generation rates are 0.461 children per unit for grades Kindergarten through 8th." (DEIR pg. 149.) Using these rates, the DEIR calculates that the Project "could result in approximately 250 additional students to the Berryessa Union School District," but goes on to acknowledge that the 2005 enrollment

Licinia Mc Morrow
Department of Planning, Building & Code Enforcement, City of San Jose
February 23, 2008
Page 4

for Vinci Park Elementary School was at capacity, and that Piedmont Middle School was 37 students over capacity in 2005. (DEIR pg. 149.) Current year enrollment at Piedmont remains at capacity (2008 CBEDS – 1,026 students) and Vinci Park has grown since 2005 forcing the district to add portable classrooms on the campus (2008 CBEDS – 716 students).

The DEIR must analyze the location, size, capacity and structure of existing School District facilities as well as providing reasoned data and analysis regarding student generation rates before reaching an informed conclusion regarding the existence and significance of any impacts on the School District from the Project. In fact, the School District does not have adequate facilities to house the students who will eventually reside in the increased residential units generated by the Project.

2. DEIR Does Not Adequately Describe Enrollment Trends

The DEIR does not adequately describe the School District's past and present enrollment trends. While the DEIR does state the enrollment for the schools affected by the Project, it does not discuss whether enrollment has been increasing, decreasing or sustaining. As a result, the DEIR cannot adequately evaluate the projected future impact the students from the Project will have on the schools over time. In fact, as acknowledged by the DEIR, the affected elementary school (Vinci Park) already exceeds capacity. Also, all of the School District's middle schools are close to capacity, with the affected middle school (Piedmont) already overcrowded with an enrollment of 1,026.

3. DEIR Fails to Identify the Cost of Providing Capital Facilities to Accommodate Students on a Per-Pupil Basis

Licinia McMorrow
Department of Planning, Building & Code Enforcement, City of San Jose
February 28, 2008
Page 5

The DEIR does not identify the cost of providing capital facilities to accommodate students on a per-student basis. Specifically, it does not address the situation of whether the additional students from the Project are going to require additional classrooms which would not otherwise be required absent the Project, resulting in a higher "per-pupil cost." For instance, if a school had three third grade classes, all at capacity, and the Project generated four third graders, the school could have to open an entirely new class to accommodate four students. The cost associated with the capital facilities to accommodate those four students should be assessed on a per-pupil basis because, without the Project, there would be no need for the additional facilities to serve the Project.

4. DEIR Does Not Identify Any Specific Expected Fiscal Impacts on the School District

The DEIR does not identify any specific expected fiscal impacts on the School District, including an assessment of projected cost of land acquisition, school construction, and other facilities needs. For instance, the potential cost to the School District of acquiring property for the construction of new school facilities within the Project area may be prohibitive. In fact, the School District projects that developer fees will be inadequate to offset the potential fiscal impacts of the Project.

5. DEIR Does Not Assess Cumulative Impacts

The DEIR does not assess the cumulative impacts on schools resulting from additional development already approved or pending. Under Public Resources Code section 21083 and CEQA Guidelines 15355, *et seq.*, the City must analyze the cumulative impacts of a proposed project. Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (Guidelines § 15355.) The individual effects may be changes resulting from a single project or a number of separate projects. (*Id.* at 15355(a).) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable future projects. (*Id.* at 15355(b).)

In this case, the DEIR does not address the cumulative impact to the School District of this Project together with the development of the Flea Market site, and any other projects that may be pending. The DEIR acknowledges the planned development of the Flea Market site but makes no effort to consider the cumulative impact on the District of both projects. As such, the DEIR fails adequately to assess the impact on schools.

Specific Failure of DEIR to Analyze Impacts to Schools Other than Facilities

In addition to the impacts on school facilities, CEQA requires an evaluation of Project impacts on all school related services. The DEIR mentions only the facilities requirements. Specifically, the DEIR should address the following issues related to public school services.

Licinia McMorrow
Department of Planning, Building & Code Enforcement, City of San Jose
February 28, 2008
Page 6

1. DEIR Does Not Provide a Description of Projected Staffing Requirements

The DEIR does not provide a description of projected teacher/staffing requirements based on anticipated population growth and existing State and School District policies. This information is critical for the City to assess whether the Project impacts staffing requirements by necessitating additional teachers. Like the capital facilities assessment described in the preceding section, this assessment must be completed on a per-pupil basis.

2. DEIR Does Not Analyze Whether the Project Has Any Impact on Curriculum

The DEIR fails to analyze whether there is any impact on curriculum as a result of anticipated population growth. Specifically, the DEIR should have addressed whether additional programs would now be required (including but not limited to special education and specific general education courses) as a result of the influx of students from the Project, and whether funding exists to provide those programs.

3. DEIR Does Not Assess Each School District's Present and Projected Capital Facility, Operation and Personnel Costs

The DEIR does not assess the School District's present and projected capital facility, operations and personnel costs. Without this information, the City cannot make an adequate assessment of whether or not the school services will actually be impacted.

4. DEIR Does Not Assess Forseeable Impacts on Traffic

To the extent that students in the project would have to be transported to other areas for school, it is foreseeable that traffic and pedestrian safety impacts would arise. The DEIR fails to take into account this reasonably foreseeable impact.

DEIR's Inadequacy Regarding Mitigation Measures

Based on the deficiencies of the DEIR described above, along with the fact that the DEIR does not identify the expected shortfall between estimated development fees to be generated by the Project and the cost for provision of capital school facilities, it is the School District's position that the DEIR improperly fails to identify the impact on schools as a significant, not fully mitigated environmental impact. Under the Government Code, the City has a duty to coordinate with the School District to provide effective school site planning. (Gov. Code §§ 65352 & 65352.2.) The City should consider alternative mitigation measures, such as those proposed below, to fulfill that duty.

State Law Does Not Limit School Impact Mitigation to Developer Fees

The DEIR notes that "State law (Government Code Section 65996) specifies an acceptable method of offsetting a project's effect on the adequacy of school facilities as the payment of a school impact fee prior to issuance of a building permit." (DEIR pg. 150.) This statement is conclusory and without merit.

FEB-29-2008 FRI 09:57 AM BERRYESSA UNION SCH DIST FAX NO. 408 926 8329

P. 08

Licinia McMorro
 Department of Planning, Building & Code Enforcement, City of San Jose
 February 23, 2008
 Page 7

In fact, Government Code section 65996 (all subsequent code sections refer to the Government Code unless otherwise specified) does not relieve a city or county from analyzing the impact on schools of a proposed project, concluding that there are significant impacts that may remain unmitigated and further analyzing whether a mitigation measure is available to adequately mitigate the impacts. The Project cannot be approved unless the City either imposes mitigation measures adequate to mitigate identified impacts to a level of less-than-significant or the City adopts an applicable statement of overriding consideration. (Pub. Res. Code § 21002; CEQA Guidelines §§ 15021 (a) (2), 15091 (a) & 15096 (g); see Sierra Club v. Gilroy City Council (1990) 22 Cal.App. 3d 30.) The developer fees cited by the DEIR would not necessarily mitigate all impacts of this development. Additionally, the DEIR concedes that developer fees would only "partially offset project-related increases in student enrollment" but fails to explore other measures that would alleviate the impact of those increases in student enrollment, or reduce them to a level of less than significant. (DEIR pg. 150.)

The Legislature Intended Coordinated Planning for School Sites

Sections 65352 and 65352.2 require local cities and counties to coordinate planning of school facilities with school districts. The Legislature confirmed that the parties are meant to coordinate "[o]ptions for the siting of new schools and whether or not the local city or counties existing land use element appropriately reflects the demand for public school facilities, and ensures that new planned development reserves location for public schools in the most appropriate locations."

The Legislature recognized that new planned development should take into consideration and even "reserve" where schools would be located to serve the development because schools are as integral a part of planning for new development as is any other public service, such as fire, police, water and sewer. As it relates to this case, the intent behind sections 65350, et seq., supports the District's position that the City must analyze whether the current size of District schools is adequate to accommodate both its existing population and the new development (which it is not), particularly in light of the cumulative factors addressed in this letter. The City can help the District provide adequate facilities resulting from the impact of the Project, which are not addressed by developer fees, by requiring alternative measures to assure that there is an adequate site to accommodate school facilities.

Alternative Measures

Land Dedication

One possible measure would be for the City to consider adopting findings requiring any developer building residential units on the Project site to dedicate land and/or funding pursuant to sections 65970 et seq., which permit the City to require a developer to dedicate land to a School District. Section 65974 specifically states that "for the purpose of establishing an interim method of providing classroom facilities where overcrowded conditions exist, . . . a city, county, or city and county may, by ordinance, require the dedication of land, or the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition to the approval of a residential development." We note that it appears that

Licinia McMorro
Department of Planning, Building & Code Enforcement, City of San Jose
February 23, 2008
Page 8

the District has an agreement with the Flea Market for the dedication of land for a school site that would serve the students from this Project. However, if for any reason the District does not actually receive the land from the Flea Market, or if the development from this Project occurs before the Flea Market development, the issue of land dedication would need to be addressed.

A land dedication requirement would be good public planning benefiting all residents of the community, including future residents of the Project. As development occurs, land suitable for new school sites grows scarcer. Under sections 65352 and 65352.2, the City has a duty to help plan for adequate services to their residents by ensuring that future sites are set aside for schools. Failure to do so leads to inadequate services, future controversies, and the potential need for a school district to exercise its rights under eminent domain to displace existing residents.

Finally, land dedication is a permissible mitigation measure under sections 65995, et seq., which are cited by the DEIR. Section 65995, subdivision (a), specifically states that "[e]xcept for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication or other requirement for the construction or reconstruction of school facilities may not be levied" Section 65995 expressly excludes Chapter 4.7, inclusive of section 65974, from this limitation, thus permitting a city to address conditions of overcrowding in school facilities or inadequately sized school sites by requiring, for example, the dedication of land.

Further, the City is authorized by section 66478 of the Subdivision Map Act to require dedication of elementary school sites when needed to address development. Nothing in sections 65995, et seq., precludes such a requirement.

Land dedication is particularly important in the project's vicinity given the lack of available vacant land for school facilities.

Phasing

Another method by which the City can work cooperatively with the School District within all legal constraints to ensure adequate school facilities with regard to new development is by requiring development to be phased and not permitted prior to availability of school facilities. Timing development so as to balance the availability of school facilities with new development can significantly aid the School District in its attempt to provide for the additional students generated by new development.

Cooperative Use

The City and the School District can also work together to ensure adequate school facilities to serve the residential units contemplated by the Project by entering into a partnership to jointly use school and park land for recreation and educational purposes. It is desirable for both public entities to have land set aside for both school and park use so that a single joint use facility of ten or more acres would be available to both the School District and residents within the Project site. Again, it appears that the District has an agreement with the Flea Market for the dedication of land for a school site that would be cooperatively used. However, as stated above, if for any

FEB-29-2008 FRI 09:58 AM BERRYESSA UNION SCH DIST FAX NO. 408 926 8329

P. 10

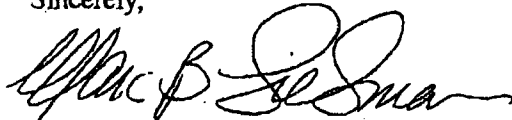
Licinia McMorro
Department of Planning, Building & Code Enforcement, City of San Jose
February 23, 2008
Page 9

reason the District does not actually receive the land from the Flea Market or if the development from this Project occurs before the Flea Market development, the City could aid the School District in its effort to provide appropriate facilities for the additional students generated by the Project by considering this issue.

Conclusion

It is the District's position that the DEIR does not adequately analyze the Project's potential impacts to schools. The DEIR must address with greater specificity the impacts on school facilities and services. The District encourages the City to work cooperatively with the District and consider alternative measures, such as phasing or land dedication, which can adequately address the impacts on the District's schools.

Sincerely,



Marc B. Liebman, Ph.D.
Superintendent



SFPP, L.P.
Operating Partnership

February 1, 2008

ENG 4-2-1 (930)
Reference #08-053

Licinia McMorrow
Dept. of Planning, Building and Code Enforcement
City of San Jose
Tower 3rd Floor
200 East Santa Clara Street
San Jose CA 95113

Re: Draft Environmental Impact Report (EIR)
File No. GP06-04-05
File No. GP07-04-04

Dear Ms. McMorrow:

This letter is in response to the Notice of Availability of a Draft Environmental Impact Report (EIR) and Public Comment Period we received January 22, 2008, concerning the above referenced project.

Based on the information you have provided, Kinder Morgan has no conflict with the proposed project.

In the event the project scope changes, please resubmit your request.

Sincerely,

A handwritten signature in cursive script, appearing to read 'A. Sidorewicz', is written over a horizontal line.

A. Dianne Sidorewicz CPS
Administrator
Engineering

T: Quinn\etters\421(930)\08-053

Attachment